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Defragmenting World Trade

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Defragmenting World Trade

*Sungjoon Cho**

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I. INTRODUCTION: THE “SPAGHETTI BOWL” CRISIS

The global trading community is in a state of deep crisis. Its main system, multilateralism, has recently been clogged by viscous trade barriers created by a proliferation of bilateral, regional trading blocs. Globalization offers a worldwide “production value chain” which enables even small economies to take part in the global commerce by offering raw materials or labor. In fact, small economies hold a comparative advantage at certain stages of the international manufacturing process.¹ However, the current pattern of regional trading blocs militates against such participation by erecting new barriers against non-members and thus compartmentalizing the global market.² This is not what globalization and free trade are meant to be.

It is the contention of this article that the current proliferation of regional trade agreements (“RTAs”)³ has disrupted the original equilibrium between multilateralism (globalism) and regionalism that was established in the 1940s under the General Agreement on Tariffs and Trade (“GATT”).⁴ In the absence of such equilibrium, world trade becomes fragmented. Such fragmentation ultimately impedes the fulfillment of the *raison d’être* of the World Trade Organization (“WTO”): the simultaneous promotion of free trade, adequate regulation, and development.⁵ To remedy this crisis, the previous equilibrium must be restored by defragmenting world trade through both institutional and judicial strategies.

More RTAs have been created under the WTO, which has existed for a little over a decade, than were created during the half-century existence of

¹ Victor Fung, *Bilateral Deals Destroy Global Trade*, FIN. TIMES, Nov. 4, 2005, at 13, available at <http://www.ft.com/home/us> (search for “Bilateral Deals Destroy Global Trade”; then follow “COMMENT: Bilateral deals destroy global trade” hyperlink).

² *Id.* See also Victor Mallet & Anna Fifield, *APEC Admits Dangers of Bilateral Deals*, FIN. TIMES, Nov. 18, 2005, at 7 (quoting Sergio Garcia de Alba Zepeda), available at <http://www.ft.com/home/us> (search for “APEC Admits Dangers”; then follow “INTERNATIONAL NEWS: Apec admits dangers of bilateral deals” hyperlink).

³ In this article, RTA is used as a generic term connoting both free trade areas and customs union under GATT Article XXIV.

⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-7, 55 U.N.T.S. 187 [hereinafter GATT].

⁵ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1140, 1144–53 (1994) [hereinafter WTO Agreement].

GATT, its predecessor.⁶ Nowadays, more than half of all global trade is performed within these blocs.⁷ Since these RTAs are preferential and discriminatory by nature, their unchecked multiplication seriously *fragments* world trade by attacking the Most-Favored-Nation (“MFN”) principle, which is the backbone of the multilateral trading system. Moreover, those RTAs tend to hijack the current WTO Doha Round negotiation by depriving poorer WTO Members of deserved attention and limited resources.⁸

Granted, RTAs are not entirely without merits. They can complement the multilateral trading system. In fact, Article XXIV of GATT endorses them as a facilitator of international trade.⁹ One might reasonably speculate that because regional blocs have far fewer participants than the WTO (at nearly 150 members and counting), bloc members can engage in more flexible and effective negotiations on trade liberalization.¹⁰ Also, with smaller numbers of members, RTAs might experiment with various regulatory standards.¹¹ These merits are conceivable as long as the complementarity test is met under GATT Article XXIV, and therefore the original equilibrium between regionalism and globalism is maintained.

However, the current form of regionalism, which may be termed “Neo-Regionalism” for its characteristically unprecedented ubiquity and intensity,

⁶ CONSULTATIVE BOARD TO THE DIRECTOR-GENERAL, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 21 (Jan. 17, 2005), available at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf [hereinafter CB Report].

⁷ See Ken Heydon, *Regionalism: A Complement, Not a Substitute*, in REGIONALISM AND THE MULTILATERAL TRADING SYSTEM 11, 12 (Organisation for Economic Co-operation and Development 2003) [hereinafter OECD, REGIONALISM].

⁸ ROBERT SCOLLAY, PRELIMINARY ASSESSMENT OF THE PROPOSAL FOR A FREE TRADE AREA OF THE ASIA-PACIFIC (FTAAP): AN ISSUES PAPER FOR THE APEC BUSINESS ADVISORY COUNCIL (ABAC) 32, <http://www.apec.org.au/docs/koreapapers2/SX-RS-Paper.pdf> (last visited Jan. 17, 2005).

⁹ GATT, *supra* note 4, art. XXIV, para. 4 (as amended by Special Protocol relating to article XXIV of the General Agreement on Tariffs and Trade, signed at Havana, on 24 March 1948, GATT/1/162/ 24 March 1948, available at http://www.wto.org/gatt_docs/English/SULPDF/90310346.pdf) (“The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to *facilitate trade between the constituent territories* and not to raise barriers to the trade of other contracting parties with such territories.” (emphasis added)).

¹⁰ WORLD BANK, GLOBAL ECONOMIC PROSPECTS: OVERVIEW AND GLOBAL OUTLOOK vii (2005), available at <http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf> [hereinafter GLOBAL ECONOMIC PROSPECTS].

¹¹ See generally Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT’L L. J. 419, 429–36 (2001) [hereinafter Cho, *A New Perspective*].

is in fact *replacing*, not complementing, the multilateral trading system. Regional trading blocs have become the “standard” of international trade, not the complementary vehicle.¹² Therefore, the original equilibrium between regionalism and multilateralism has been broken, and this broken equilibrium has in turn brought critical consequences to the global trading system.

First of all, the “spaghetti bowl” of mushrooming mercantilist blocs under Neo-Regionalism ultimately results in *Least-Favored Nation* treatment superseding the *Most-Favored-Nation* principle of multilateralism in the global context.¹³ While those blocs may facilitate intra-bloc trade, they stress the global trade by raising new barriers to extra-bloc trade and disassociating a bloc from the rest of the world due to its preferential nature. Moreover, in many cases even intra-trade liberalization remains limited because certain sectors are insulated from open trade. These sectors are often simply excluded from the coverage of RTAs or otherwise protected through complicated rules of origin. Thus, RTAs tend to “institutionalize” protectionism.¹⁴

A recent surge of RTAs also precipitates regulatory failure. Many social charters in RTAs are not only inconsistent with WTO norms but also cause regulatory gridlock in the global context.¹⁵ Certain recent bilateral deals have managed to dilute the multilateral disciplines on public health by inserting WTO-plus provisions on trade and intellectual property rights.¹⁶ In addition, such regulatory heterogeneity itself is a serious trade barrier. Multiple regulations over the same subject matter are simply at odds with the globalized production system. A patchwork of regulatory regimes increases transaction costs for global business.

Finally, those RTAs between the rich and the poor under which the former plays a hub and the latter a spoke may bring developmentally negative consequences to the latter. These hub-and-spoke model RTAs tend to serve the economic interests of the hub to the detriment of the spoke, especially when sensitive products on which the spokes hold comparative advantages are excluded from the coverage of these RTAs. A recent World Bank report warns that bilateral trade deals decrease the wealth of most poor countries, while a multilateral trading agreement could enrich both rich and poor nations.¹⁷ A simulation in the report demonstrates that if all developing countries sign bilateral trade agreements with developed countries, low income countries’ real income would actually

¹² See Fung, *supra* note 1.

¹³ CB Report, *supra* note 6, at 19.

¹⁴ See Evdokia Moïsé, *Rules of Origin*, in OECD, REGIONALISM, *supra* note 7, at 161.

¹⁵ See discussion *infra* Part III.B.2.

¹⁶ See discussion *infra* Part III.B.3.

¹⁷ See *Trade Policy: Exclusive*, ECONOMIST, Nov. 20, 2004, at 78 [hereinafter *Exclusive*].

shrink by 1.0% over the next decade.¹⁸

Admittedly, RTAs are often suffused with *political* considerations that may prevail over the aforementioned concerns of economic policy.¹⁹ Under such non-economic considerations, GATT Article XXIV could serve trading nations' political needs for regionalism and thus demonstrate its "political savvy."²⁰ However, history eloquently attests that attempts to rationalize regionalism based on political contemplation are fatally flawed. The current Neo-Regionalism is reminiscent of the interwar prevalence of regionalism over multilateralism. In the 1930s, regional trading blocs were mobilized for cut-throat mercantilist competition, which shrunk world trade nearly 70% and further deepened the Great Depression worldwide.²¹ This regionalism-*cum*-mercantilism eventually contributed to the outbreak of World War II ("WWII").²²

Seventy years later, the United States and the European Union are reenacting their interwar mercantile rivalry by rushing to form preferential blocs (European Union and Free Trade Agreement of the Americas), rather than pursuing multilateral trade liberalization.²³ Paul Krugman has observed that an even worse outcome for the multilateral trading system could occur should a third East Asian bloc emerge and further fragment the

¹⁸ See GLOBAL ECONOMIC PROSPECTS, *supra* note 10, at xvi.

¹⁹ See Cho, *A New Perspective*, *supra* note 11, at 423–29 (discussing varying origins of economic regionalism and pertinent empirical observations). See also John Redmond, *ASEAN in a World of Trade Blocs: Pacific Integration in the Asia-Pacific*, in REGIONAL TRADE BLOCS, MULTILATERALISM, AND THE GATT: COMPLEMENTARY PATHS TO FREE TRADE? 170 (Till Geiger & Dennis Kennedy eds., 1996) [hereinafter COMPLEMENTARY PATHS] ("[T]he Asia-Pacific lacks the unifying factors that were present in Western Europe in the post-Second War period—a desire for peace, as well as the need to contain Germany and to check the Soviet threat. This has left regional integration in the Asia-Pacific with a lack of purpose and enfeebled the process.").

²⁰ Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 INT'L REV. L. & ECON. 27, 50 (1996).

²¹ See Edward C. Luck, *American Exceptionalism and International Organization: Lessons from the 1990s*, in U.S. HEGEMONY AND INTERNATIONAL ORGANIZATIONS: THE UNITED STATES AND MULTILATERAL INSTITUTIONS 25, 39 (Rosemary Foot et al. eds., 2003) (quoting remarks by the former U.S. Trade Representative Charlene Barshefsky on U.S. trade policy and the WTO on Mar. 2, 2000). See also Patrica Clavin, *The Triumph of Regionalism over Globalism: Patterns of Trade in the Interwar Period*, in COMPLEMENTARY PATHS, *supra* note 19, at 31–33.

²² See Dennis Kennedy, *Regional Trading Blocs, Multilateralism and the New GATT Agreement: An Introduction*, in COMPLEMENTARY PATHS, *supra* note 19, at 1 [hereinafter *Introduction*]; Clavin, *supra* note 21, at 33.

²³ See Richard H. Steinberg, *Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism*, 29 LAW & POL'Y INT'L BUS. 205, 255 (1998).

global trading system.²⁴ To that extent, the specter of a return to the destructive regionalism of the Thirties remains.

Against this backdrop, this article serves two purposes. First, it aims to amplify the chorus of alarms emanating from a number of sources, including the recent WTO Consultative Board ("CB") Report.²⁵ The article is a timely effort to raise the warning level about the damaging effects of regionalist fragmentation on the global trading system. Second, this article endeavors to overcome some of the shortcomings of the existing literature in this field. Most studies of regionalism have been rather case specific, focusing on individual RTAs, such as the North American Free Trade Agreement ("NAFTA"), and the Southern Common Market ("MERCOSUR") and the European Union.²⁶ A consolidated balance sheet of regionalism and multilateralism does not appear in any of these case specific studies.

Furthermore, much of the existing literature has been written by economists.²⁷ Although economic analysis may supply an empirical basis for the understanding of RTAs,²⁸ it generally fails to provide legal analysis

²⁴ ROBERT SCOLLAY & JOHN P. GILBERT, NEW REGIONAL TRADING ARRANGEMENTS IN THE ASIA PACIFIC? 6 (2001).

²⁵ See generally Sungjoon Cho, *The Future of the WTO: Report by the Consultative Board*, ASIL INSIGHTS, Jan. 2005, <http://www.asil.org/insights/2005/01/insight050131.htm>.

²⁶ See, e.g., FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM (1995); Ana Maria de Aguinis, *Can MERCOSUR Accede to NAFTA?: A Legal Perspective*, 10 CONN. J. INT'L L. 597 (1995); Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO—No Surprise, but Wise?*, 6 EUR. J. INT'L L. 245 (1995); Pieter J. Kuijper, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 EUR. J. INT'L L. 222 (1995); David Lopez, *Dispute Resolution Under MERCOSUR from 1991 to 1996: Implications for the Formation of a Free Trade Area of the Americas*, 3-SPG NAFTA: L. & BUS. REV. AM. 3 (1997); Stephen P. Sorensen, *Open Regionalism or Old-Fashioned Protectionism?: A Look at the Performance of MERCOSUR's Auto Industry*, 30 U. MIAMI INTER-AM. L. REV. 371 (1998).

²⁷ See, e.g., JEFFREY A. FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM (1997); THE POLITICAL ECONOMY OF REGIONALISM (Edward D. Mansfield & Helen V. Milner eds., 1997); RICHARD POMFRET, THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS (1997); SCOLLAY & GILBERT, *supra* note 24; Jagdish Bhagwati, *Regionalism Versus Multilateralism*, 15 WORLD ECON. 535, 544–45 (1992) [hereinafter Bhagwati, *Regionalism*]; Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *CGE Modeling and Analysis of Multilateral and Regional Negotiating Options*, (Univ. Mich. Sch. of Pub. Policy, Discussion Paper No. 468, 2001); Jacques J. Polak, *Is APEC a Natural Regional Trading Bloc?: A Critique of the 'Gravity Model' of International Trade*, 19 WORLD ECON. 33 (1996).

²⁸ See, e.g., Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *Multilateral, Regional, and Bilateral Trade-Policy Options for the United States and Japan* (Univ. Mich. Sch. of Pub. Policy, Discussion Paper No. 490, 2002) (finding that regional blocs are inferior to the WTO trade rounds in creating economic welfare); *Exclusive*, *supra* note 17, at 78 (quoting the recent World Bank report showing that regional deals have contributed to global

anchored by the purpose and objective of the multilateral trading system. Just as the integrationist *telos* of the WTO serves as an ultimate hermeneutical criterion for the interpretation of various trade rules,²⁹ it can offer a normative litmus test with which to assess the negative effects of fragmentation which Neo-Regionalism may inflict on multilateralism. In this regard, this article highlights certain teleological failures caused by regionalist fragmentation and proposes both institutional and judicial means to defragment world trade.

Part II begins by highlighting the paradoxical nature of regional blocs: their effect may be centripetal, i.e., integrating, among their members, but centrifugal, i.e., disintegrating, to non-members. It then documents how the original equilibrium between these regional blocs and the multilateral trading system has been broken under current manifestations of Neo-Regionalism.

Part III builds on this background by probing the damages in which the broken equilibrium results, i.e., regionalist fragmentation. First, a tripartite *telos* of the modern multilateral trading system: free trade, regulatory harmonization, and development is adopted as an investigatory criterion. This criterion is then applied to the current regional trading blocs in order to confirm that these blocs hinder and impede the fulfillment of the tripartite *telos*.

A wholesale elimination of regional trading blocs is neither a realistic nor a desirable option. RTAs die hard for political reasons and are also useful under certain circumstances. Therefore, the only solution for the WTO is to restore the original equilibrium of complementarity by defragmenting the status quo, i.e., multilateralizing the current configuration of RTAs. In this vein, Part IV suggests two defragmenting strategies. The first strategy features various “institutional” reforms, such as an “open regionalism” under which regional trade liberalization can be shared with non-members, regulatory convergence under the WTO and through international standards, and a monitoring mechanism for RTAs. The second strategy recognizes that institutional reforms require a certain degree of political support that is not necessarily in existence at the present time. In fact, political needs for regionalism may resist such reforms. Under these circumstances, both regional and WTO tribunals can contribute to defragmentation of world trade through judicial intervention to steer regional trade policies in the firm direction of multilateralism. For instance, regional trade tribunals may interpret RTA texts in a way that is consistent

tariff cutting only by 10% between 1983 and 2003).

²⁹ See, e.g., Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶¶ 146–60, WT/DS58/AB/R (Oct. 12, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm (invoking the WTO’s objective of “sustainable development” in interpreting a vague language of GATT Article XX).

with the WTO Agreement under a constructive hermeneutics analogous to the *Charming Betsy* doctrine.³⁰

Finally, Part V concludes that the defragmentation of world trade would result in a “federalistic” reconfiguration of regional trading blocs in the constitutional terrain of the multilateral trading system. This federalistic order derives not merely from an economic formula of a Vinerian test, but more from the very *telos* of the multilateral trading system, i.e., an “integrated, more viable, and durable” system,³¹ under which the tripartite mission of trade, regulation, and development is implemented.

II. THE EQUILIBRIUM BETWEEN REGIONALISM AND GLOBALISM

A. The Disintegrationist Nature of Regionalism

Regionalism, on account of its inward looking nature, exhibits disintegrationist features vis-à-vis the rest of the world in its design as well as its operation. Although a regionalist project, be it a free trade area or a customs union, is driven by an integrationist ethos in a regional dimension, it is eventually disintegrationist in the sense that it discriminates against those non-members excluded from such a project. In other words, the parochial bond among RTA members, which is backed by exclusive trade preferences, not only distances these members from non-members, but also brews tensions between members. History provides empirical confirmations of this preposition.

In Europe, regionalist projects often assumed a nation building mission. For instance, the *Deutscher Zollverein*, one of the earliest regional initiatives, established a customs union among eighteen small German states in 1834.³² In 1871, it expanded to include Alsace-Lorraine.³³ With the encouragement of Prussian leadership under Chancellor Otto von Bismarck, the *Deutscher Zollverein* became an underpinning of the *Deutsches Reich*.³⁴ Although these regional integration projects contributed greatly to the emergence of nation states, their exclusive and mercantilist nature concurrently split Europe and subsequently pitted one against another in the colonialist competition, which climaxed into World War I (“WWI”).³⁵ Fierce rivalry among European imperialist powers, which

³⁰ See discussion *infra* Part IV.C.2.

³¹ WTO Agreement, *supra* note 5, at 1144.

³² See generally WILLIAM O. HENDERSON, *THE ZOLLVEREIN* (1939).

³³ *Id.*

³⁴ *Id.*

³⁵ See ANDREW PORTER, *EUROPEAN IMPERIALISM 1860–1914* (1994); see also ALAN HODGART, *THE ECONOMICS OF EUROPEAN IMPERIALISM* (1978).

precipitated the “Scramble for Africa,” is considered as one of the main culprits behind the outbreak of WWI.³⁶

However, old habits die hard. After an evanescent globalism after WWI, the world once again fell to the destructive pattern of regionalism. During the interwar period, major powers, such as the United Kingdom, France, and the United States, competitively formed preferential trading blocs, which some argue contributed to the deepening of the Great Depression,³⁷ together with the notorious Smoot-Hawley Tariff Act of 1930.³⁸ The interwar global economic balkanization eventually split the world into haves, such as the United States and the United Kingdom, and have-nots, such as Germany, Italy, and Japan, which formed an “Axis” among themselves.³⁹ This series of unfortunate events contributed to the outbreak of WWII.⁴⁰ It was not until the end of WWII that nations realized how damaging regionalism can be. This realization was reflected in the creation of GATT, a multilateral architecture of the international trade system, and in particular, GATT Article XXIV.

B. The Original Equilibrium between Regionalism and Globalism under GATT Article XXIV

Although regionalism was widely condemned as one of the major contributing factors to two tragic wars in the twentieth century, its political resiliency was still salient even after the end of WWII. For instance, the United Kingdom wished to sustain the pre-war “Commonwealth preferences” despite the U.S. master globalization plan.⁴¹ Moreover, although many former colonies began to become independent in the post-war milieu, both former colonizers and colonies maintained their strong bonds, particularly in economic relationships.⁴² Even the United States saw the need to foster a strategic regionalism in Europe in order to reconstruct the continent and check the expansionist Soviet communist regime.⁴³

³⁶ See generally THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: THE WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912* (1st ed. 1991).

³⁷ See Edward D. Mansfield & Helen V. Milner, *The New Wave of Regionalism*, 53 INT'L ORG. 589, 597 (1999).

³⁸ Smoot-Hawley Tariff Act of 1930 (codified as amended at 19 U.S.C. §§ 1304–1681b (2000)).

³⁹ See *Introduction*, *supra* note 22; Clavin, *supra* note 21.

⁴⁰ See Clavin, *supra* note 21.

⁴¹ See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 576–77 (1969) [hereinafter JACKSON, *THE LAW OF GATT*].

⁴² For instance, the European Community signed a comprehensive preferential trade agreement in 1975 (The Lomé Convention) with its former colonies in Africa, Caribbean, and Pacific region and has regularly renewed it ever since. See Joseph L. Brand, *The New World Order of Regional Trading Blocks*, 8 AM. U. J. INT'L L. & POL'Y 155, 158–60 (1992).

⁴³ JACKSON, *THE LAW OF GATT*, *supra* note 41, at 576–77.

Those varying strategic calculations left an indelible relic of regionalism in the post-war architecture of the global trading system.

Against this backdrop, GATT Article XXIV⁴⁴ was provided as a compromise between globalist ideals and regionalist realities. The Article endorses the formation of free trade areas and customs unions, as long as they would “facilitate,” not undermine, global trade.⁴⁵ This equilibrium enabled by GATT’s conciliatory stance on regionalism was justified on economic grounds. In his seminal work, *The Customs Union Issue*, Jacob Viner introduced two different economic effects of regional trading blocs: an integrationist, centripetal effect (trade creation) and a disintegrationist, centrifugal effect (trade diversion).⁴⁶ Viner implied that RTAs might be desirable, as long as the trade creating effect is more influential than the trade diverging one.⁴⁷

The structure of GATT Article XXIV echoes Viner’s insight. Paragraph 4 of the Article, while acknowledging the “desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration,” nonetheless emphasized that RTAs should “facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.”⁴⁸ In this line, the Article stipulated internal (Paragraph 8), external (Paragraph 5), and procedural (Paragraph 7) requirements that any RTA should meet to be permitted under GATT. Paragraph 8 provides that “substantially all the trade” between/among the constituent territories should be liberalized.⁴⁹ Paragraph 5 provides that post-formation incidences of duties and other

⁴⁴ GATT, *supra* note 4, art. XXIV.

⁴⁵ *Id.* art. XXIV, para. 4.

⁴⁶ JACOB VINER, *THE CUSTOM UNION ISSUE* 44–45 (1950). Viner observed that:

Where the *trade-creating* force is dominant, one of the members at least must benefit, both may benefit, the two combined must have a net benefit, and the world at large benefits; but the outside world loses, in the short-run at least, and can gain in the long-run only as the result of the general diffusion of the increased prosperity of the customs union area. Where the *trade-diverting* effect is predominant, one at least of the member countries is bound to be injured, both may be injured, the two combined will suffer a net injury, and there will be injury to the outside world and to the world at large. The question as to what presumptions can reasonably be held to prevail with respect to the relative importance in practice of the two types of effects will be examined subsequently.

(emphasis added).

⁴⁷ *Id.* But see *Introduction*, *supra* note 22, at 2 (criticizing that Viner’s theory ignored the gains from economies of scale and changes in the terms of trade as well as the potential gain through increased economic growth and foreign competition within a customs union).

⁴⁸ GATT, *supra* note 4, art. XXIV, para. 4.

⁴⁹ *Id.* art. XXIV, para. 8.

trade restrictions vis-à-vis non-members should not be higher than those at the preformation stage. Paragraph 7 provides that GATT should be promptly notified of any plan to launch an RTA for the sake of transparency and further deliberation. To the extent that RTAs satisfy all of these requirements, they are deemed “building blocks,” and not “stumbling blocks” to the multilateral trading system.⁵⁰ Therefore, the original equilibrium struck between RTAs (regionalism) and GATT (globalism) is that the former are supposed to “complement but [can]not substitute” the latter.⁵¹

C. The Equilibrium Maintained: Regionalism under GATT (1947–1994)

Early records of post-war regionalism were hardly impressive in economic terms.⁵² Over-politicized rhetoric, ranging from anti-colonialism in Latin America to security alliances in South East Asia, prevailed over economic rationale in the Sixties and Seventies.⁵³ RTAs such as the Latin American Free Trade Association (“LAFTA”),⁵⁴ the North Atlantic Free Trade Area,⁵⁵ and the Association of South East Asian Nations (“ASEAN”),⁵⁶ which were created against this political backdrop,

⁵⁰ This catchy phrasing was invented by Bhagwati and popularized by Lawrence. See JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 77 (1991) [hereinafter BHAGWATI, *AT RISK*]; FRANKEL, *supra* note 27, at 209; Robert Lawrence, *Emerging Regional Arrangements: Building Blocks or Stumbling Blocks?*, in *FINANCE AND THE INTERNATIONAL ECONOMY* 22–35 (Richard O’Brien ed., 1991).

⁵¹ OECD, *REGIONALISM*, *supra* note 7, at 3.

⁵² See BHAGWATI, *AT RISK*, *supra* note 50, at 71.

⁵³ See Bhagwati, *Regionalism*, *supra* note 27, at 538–39.

⁵⁴ In 1960 the Treaty of Montevideo launched the Latin American Free Trade Association (“LAFTA,” “ALALC” in Spanish) to remove trade barriers between the member states over a 12 year period. The Treaty of Montevideo of 1980 restructured the Association, creating as its successor the Latin American Integration Association (“ALADI”). See Organization of American States (“OAS”), Foreign Trade Information System, *An Analytical Compendium of Western Hemisphere Trade Arrangements: General Overview*, <http://www.sice.oas.org/cp061096/english/01010100.asp#ala> (last visited Mar. 27, 2005).

⁵⁵ The North Atlantic Free Trade Area has recently been reincarnated as the “Transatlantic Economic Partnership.” See generally Ellen L. Frost, *The Transatlantic Economic Partnership* (Inst. for Int’l Econ. Pol’y Brief 98–6, Sept. 1998), <http://www.iie.com/publications/pb/pb.cfm?ResearchID=85> (providing an overview of the Transatlantic Economic Partnership).

⁵⁶ ASEAN was created in 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand, and then expanded to include Brunei Darussalam (1984), Vietnam (1995), Laos and Myanmar (1997), and Cambodia (1999). See The Association of Southeast Asian Nations (ASEAN) Overview, <http://www.aseansec.org/64.htm>. From its inception, ASEAN has focused on a political, rather than economic, agenda—namely regional peace and security—in the era of decolonization and the Cold War. See Mark Beeson, *ASEAN plus Three and the Rise of Reactionary Regionalism* (2003), available at <http://eprint.uq.edu.au/archive/00000496/01/mbasean03.pdf> (last visited Dec. 28, 2004). Its

demonstrated little economic success.⁵⁷ In Latin America, ideological narratives were more controlling in shaping the contour of regionalism.⁵⁸ In Asia, the Cold War paternalism by the United States, together with other sociocultural factors, discouraged regional economies from forming formal RTAs.⁵⁹ The European Community ("E.C.") certainly stands as an

institutional emphasis on political cooperation initially prioritized political values, such as sovereign independence and non-interference, over economic values, such as market integration and interdependence. *Id.* It was not until 1992 that ASEAN members established a free trade area amongst themselves. *Southeast Asia: A Free Trade Area*, <http://www.aseansec.org/viewpdf.asp?file=/pdf/afta.pdf> (last visited Dec. 24, 2004). As a trade liberalizing enterprise, ASEAN's performance has been lackluster. ASEAN members, which are mainly developing countries, prefer an incremental liberalization and market opening strategy. See Thomas C. Fischer, *A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN Still Matter?*, 13 DUKE J. COMP. & INT'L L. 337, 353 (2003).

⁵⁷ See Cho, *A New Perspective*, *supra* note 11, at 427–28.

⁵⁸ In Latin America, a backlash against imperialism among newly independent countries led to an inward-looking development strategy, particularly the domestic production of basic consumer goods as a substitute for importation or "import substitution." JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 174–75 (1997). In this setting, intra-regional trade liberalization was necessary to generate certain economies of scale to offset the market miniaturization inherent in inward-looking strategies. See Jason R. Wolff, *Putting the Cart Before the Horse: Assessing Opportunities for Regional Integration in Latin America and the Caribbean*, 20-SPG FLETCHER F. WORLD AFF. 103, 106 (1996). Influenced by this economic ideology, numerous regional trade agreements were initiated in the 1960's, including: the LAFTA (1960), the Central American Common Market ("CACM") (1960), and the Andean Pact (1969). *Id.*

⁵⁹ This institutional deficiency is attributable to a number of factors, which are mostly histo-political. Ever since the Western imperialist powers marched into Asia armed with superior technology provided by the Industrial Revolution, the region became a forum for power struggles and wars. Asia's colonial experiences, deep-rooted resentment from numerous wars, and diverse cultures arising from different ethnicities and languages, may explain the scarcity of formal arrangements in this region. Paul M. Evans, *Regional Institutions, Regional Identities*, in *EASTERN ASIA: AN INTRODUCTORY HISTORY* 451–58 (Colin Mackerras ed., 3d ed. 2000). Thus, as Robert Scalapino hinted, an "Asianization" process might be a formidable task. Robert A. Scalapino, *Regionalism in the Pacific: Prospects and Problems for the Pacific Basin*, 26 THE ATL. COMT. Q. 174, 178 (1988) (defining "Asianization" as a "widening and deepening network of ties between and among Asian states of diverse political and cultural nature"). Another reason for the weak regionalism in Asia may be close bilateral economic partnerships between the United States and Asian countries. In the post-war period, the United States was steadfastly committed to Asia because of its status as a main architect of the post-war economic order and as a champion of Western capitalism. The United States provided major export markets for Japan and "Newly Industrialized Economies" ("NIEs"), i.e. Singapore, South Korea, Hong Kong, and Taiwan. It even provided these countries with preferential market access, as seen in the Generalized System of Preferences ("GSPs"). Major East Asian countries' economic reliance on the United States might have obviated any need to form regional blocs. This lack of formal regional institutions has led East Asian countries to integrate themselves into the global market more vigorously. A weak trade regionalism has been funneled into a strong commitment to the multilateral trading system, such as the old GATT 1947 and the WTO.

exception to this general trend. The E.C. project flourished as its internal market was gradually integrated and subsequently revitalized Member States' economies.⁶⁰ Overall, until the Eighties, regionalist activities were spasmodic, at least in the economic sense.

However, the shaky progress of the Uruguay Round ("UR") negotiations in the late Eighties began to stir up regionalist sentiments worldwide. In North America, the United States departed from its long-standing multilateralist commitment by forming regional trading blocs with neighboring trading partners. It first entered into the U.S.–Canada Free Trade Agreement ("CUSFTA"),⁶¹ which was subsequently expanded to include Mexico and renamed NAFTA.⁶² In South America, another

See ROBERT Z. LAWRENCE, REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION (1996). The NIEs could prosper by adopting outward-looking, export-oriented development strategy, as opposed to the import-substitution strategies adopted by Latin American countries during the same period. More recently, China has transformed its economy from an old Cold War hermit to a new globalizer. Ever since it adopted the "Open Door" policy in the late 1970's, it has dramatically integrated its ever-expanding economy into the mainstream of the global market system, which recently culminated in its admission to the WTO. See Frederick M. Abbott, *Reflection Paper on China in the World Trading System: Defining the Principles of Engagement*, in CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT 4 (Frederick M. Abbott ed. 1998).

⁶⁰ See K.P.E. LASOK & D. LASOK, LAW AND INSTITUTIONS OF THE EUROPEAN UNION 14–15 (7th ed. 2001); William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001, 2009 (1994). This remarkable success can be attributed to a variety of factors, including the United States' Cold War paternalism and Europeans' own desire for peace and solidarity. See, e.g., Fascal Fontaine, *A New Idea for Europe: The Schuman Declaration—1950–2000*, http://ec.europa.eu/publications/booklets/eu_documentation/04/txt06_en.htm (last visited Dec. 23, 2004). Most of all, the EC's functional approach, which prioritized economic matters over political ones, was certainly key to its success. The whole EC project originated from a very functional, narrowly defined initiative, i.e., the "European Coal and Steel Community" ("ECSC") in 1951, under which Belgium, West Germany, Luxembourg, France, Italy and the Netherlands cooperated and coordinated regarding their coal and steel policies. See *The History of the European Union*, EUROPA (European Union Official Website), http://europa.eu.int/abc/history/index_en.htm (last visited Apr. 19, 2005).

⁶¹ United States–Canada Free-Trade Agreement, U.S.–Can., Jan. 2, 1988, 102 Stat. 1851.

⁶² North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 107 Stat. 2057. The U.S. aggressive change of course in its trade policies was also influenced by its economic woes at that time, symbolized by the Twin Deficits as well as the lesser security threat from the Soviet power. See Jagdish Bhagwati & Douglas A. Irwin, *The Return of the Reciprocitarians: US Trade Policy Today*, 10 WORLD ECON. 109 (1987); Ernesto M. Hizon, *Virtual Reality and Reality: The East Asian NICs and the Global Trading System*, 5 ANN. SURV. INT'L & COMP. L. 81, 113 (1999) (observing that the relative decline of the U.S. hegemony in the Eighties reduced its commitment toward the multilateral trading system). In other words, the U.S. government was pressured to open foreign markets more aggressively than before to better its economic situation in a post-hegemonic era when the United States no longer needed to shoulder the burdens of upholding the multilateral trading system out of security considerations.

prominent regional coalition emerged. In 1994, Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Ouro Preto to form MERCOSUR.⁶³

In Europe, the community building process of the E.C. was intensified by a series of bold projects, such as the "Single European Act" (1986), which subsequently paved the way to the European Union via the Treaty of Maastricht (1992).⁶⁴ Although a more economically integrated Europe might be desirable for its Member States, the European Union earned the derisive tag of the "Fortress" because of the difficulties that non-members had in accessing the European markets.⁶⁵ Even among Member States, such an ambitious scale and pace of integration was not uncontroversial. Margaret Thatcher, the then British Prime Minister, expressed Euro-skepticism based on her liberal faith that increased interventionism and corporatism on a European scale would be damaging to economic welfare of individual Member States.⁶⁶

The Asian-Pacific response to the Fortress Europe was the Asia Pacific Economic Cooperation ("APEC"). In 1989, Australian Prime Minister Robert Hawke proposed forming an economic cooperation forum in the Asia Pacific region, modeled after the Organization for Economic Cooperation and Development ("OECD").⁶⁷ The subtle political message

⁶³ Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing a Common Market, March 26, 1991, 30 I.L.M. 1041, available at <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp>. Originally, the MERCOSUR planned to establish a common market between two major South American economies, Brazil and Argentina, when it was first announced in 1990. See Thomas Andrew O'Keefe, *An Analysis of the MERCOSUR Economic Integration Project from a Legal Perspective*, 28 INT'L LAW. 439, 439 (1994). Yet, this plan soon drew two neighboring economies, Uruguay and Paraguay, toward it because these countries understandably feared that their smaller economies would suffer enormously should they be excluded from the common market.

⁶⁴ Jacques Delors, the then President of the European Commission, explained that: "the Single Act means, in a few words, the commitment of implementing simultaneously the great market without frontiers, more economic and social cohesion, an European research and technology policy, the strengthening of the European Monetary System, the beginning of a European social area and significant actions in environment." Juan Carlos Ocaña, *The History of the European Union: the European Citizenship*, <http://www.historiasiglo20.org/europe/acta.htm> (last visited Feb. 8, 2005).

⁶⁵ See Joel P. Trachtman, *Toward Open Recognition?: Standardization and Regional Integration under Article XXIV of GATT*, 6 J. INT'L ECON. L. 459, 462 (2003).

⁶⁶ Ocaña, *supra* note 64.

⁶⁷ See Merit E. Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947, 953 (1997). In 1993, U.S. President Clinton upgraded the APEC meeting from the ministerial level to the presidential level by hosting the Economic Leaders' Meeting. This embrace departed from U.S. policy under the previous administration. The United States' new stance ushered in an era of economic cooperation in the region while the UR negotiations came to a close. Although some ASEAN members were suspicious of the U.S. initiative to promote aggressive liberalization in the region, other

to the global trading community was that the Asia Pacific region might transform itself into another regional trading bloc like the E.C. and NAFTA, if the UR negotiation collapsed.⁶⁸

Although regionalism became a more salient phenomenon during the Eighties, it did not deter the launch of the long-awaited multilateral trade organization, the WTO. Regional options at that time functioned mostly as an “insurance policy” in the event of failure of the multilateral trade negotiations.⁶⁹ Furthermore, as was seen in the case of APEC, certain regional initiatives espoused the WTO’s multilateral agenda, thereby aiding in its creation.⁷⁰ In sum, the original equilibrium between regionalism and globalism envisioned under GATT was maintained.

D. The Equilibrium Broken: Neo-Regionalism (1995–Present)

The long-held equilibrium between regionalism and globalism has recently been broken. Regionalism has now begun to impact the multilateral trading system in unprecedented ways that are clearly distinguishable from past trends. Recent symptoms of the broken equilibrium may be captured by the label of “Neo-Regionalism,” which is

members—in particular Japan, South Korea, and Taiwan—persuaded them to follow the United States lead out of pragmatic considerations. See Martin Rudner, *Institutional Approaches to Regional Trade and Cooperation in the Asia Pacific Area*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 159, 168–69 (1994).

⁶⁸ See Janow, *supra* note 67, at 953. APEC’s original membership consisted of Australia, Brunei Darussalam, Canada, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and the United States. China (1991), Taiwan (1991), Hong Kong (1991), Mexico (1993), Papua New Guinea (1993), Chile (1994), Peru (1998), Vietnam (1998), and Russia (1998) subsequently joined the organization. APEC, *Member Economies*, http://www.apecsec.org.sg/apec/member_economies.html (last visited Feb. 11, 2005). From the outset, APEC’s institutional posture was circumspect. APEC cautiously configured its institutional place vis-à-vis pre-existing organizations whose jurisdictions might conflict with its own. APEC officially pursued harmony and even complementarity with these organizations, rather than competing for dominance. For instance, APEC avoided estranging ASEAN by recognizing ASEAN’s importance to APEC. Joint Statement of the First Ministerial Meeting (Canberra, Australia, Nov. 6–7, 1989), http://www.apecsec.org.sg/apec/ministerial_statements/annual_ministerial/1989_1st_apec_ministerial.html.

⁶⁹ WTO, *Development, Regional Integration and the Multilateral Trading System*, at 1, <http://www.wto.org/wto/develop/regional.htm> (last visited Mar. 26, 2005).

⁷⁰ *Id.* APEC repeatedly expressed its strong commitment to the multilateral trading system and the UR negotiation process. In particular, in the “APEC Seoul Declaration,” APEC members defined APEC’s institutional rationale as “open regionalism”—i.e., economic cooperation in Asia Pacific in the spirit of the multilateral trading system. Joint Statement of the Third Ministerial Meeting (Seoul, Korea, Nov. 12–14, 1991), http://www.apecsec.org.sg/apec/ministerial_statements/annual_ministerial/1991_3th_apec_ministerial.html. See generally C. Fred Bergsten, *Open Regionalism*, 20 WORLD ECON. 545, 548 (1997).

characterized by an intense proliferation and profligacy of regional trading blocs.⁷¹ More RTAs have been created during a decade under the WTO than during the half-century existence of GATT. Out of 300 RTAs extant as of October 2004, 176 RTAs were created since the launch of the WTO in 1995.⁷² The WTO Secretariat aptly epitomized this trend:

The number of regional trade agreements (RTAs) being negotiated has increased *exponentially* and their scope as well as their geographical reach have both *broadened* and *expanded*. The *resilience* of this trend is likely to *intensify* further as the few remaining countries traditionally favouring multilateral-only trade liberalization have initiated—or are actively considering—negotiations of several RTAs.⁷³

More alarming than the sheer increase in the number of RTAs is the fact that the new RTAs are unaffected by the WTO-compatibility test under GATT Article XXIV. The apparently draconian GATT Article XXIV has proven to be a paper tiger. Very few RTAs have undergone serious scrutiny under the Article, nor has a single RTA been rejected under the Article. The WTO Committee on Regional Trade Agreements (“CRTA”), whose function is to determine whether an RTA satisfies all the requirements under the Article, has been quite ineffective in providing any meaningful discipline or practical guidelines.⁷⁴ Under Neo-Regionalism, the CRTA often fails to issue even a “factual examination” report over a certain RTA in question.⁷⁵ Both the Article’s ambiguous language and the political priority placed on forming RTAs have contributed to this lack of legal discipline.⁷⁶ This “legal vacuum” has allowed the rapid unchecked increase of RTAs.

Certain analytical tools may help further understanding of the decisive political dynamics behind the broken equilibrium between globalism and regionalism. The first tool is the “Unilateralist” lens, which symbolizes the recent U.S. penchant for bilateralism over multilateralism.⁷⁷ The second

⁷¹ See WTO Secretariat, Regional Trade Integration Under Transformation (Apr. 26, 2002), http://192.91.247.23/english/tratop_e/region_e/sem_april02_e/clemens_boone_kamp.doc [hereinafter WTO, Under Transformation].

⁷² CB Report, *supra* note 6, at 21.

⁷³ WTO, Under Transformation, *supra* note 71, at 3 (emphasis added).

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 13.

⁷⁶ See Cho, *A New Perspective*, *supra* note 11, at 436–37.

⁷⁷ This proclivity for bilateralism/regionalism can also be seen in the United States’ transatlantic neighbor, the European Union. The European Union is negotiating a “Euro-Mediterranean FTA” under the “Barcelona Process,” “Economic Partnership Agreements” with African and Caribbean countries, and even FTAs with Middle East and South American countries. See AARON COSBEY ET AL., THE RUSH TO REGIONALISM: SUSTAINABLE

tool is the “Reactionary” lens, which signifies reactions to such Unilateralism by the U.S. trading partners. The third tool is the “Expansionist” lens, which describes pre-existing RTAs’ desires to expand membership.

Unilateralism, in this article, refers to the persistent departure of the United States from an MFN-based multilateral trading forum in favor of a preferential bilateral (regional) trade deal. In fact, such demultilateralization began during the period of the old GATT. Jagdish Bhagwati aptly criticized the United States “FTA-cum-301 selfish hegemon strategy,” under which the United States acts as a hub that wrings advantageous terms from its bilateral free trade agreement (“FTA”) spokes through aggressive unilateralism.⁷⁸ For example, under NAFTA, the United States extracted advantageous terms from Mexico in a “one-on-one” bargain on intellectual property protection.⁷⁹

Yet, what differentiates Neo-Regionalism from the NAFTA phenomenon is the level of intensity in the regionalist policy of the United States. In recent years, the United States has been relentless in its pursuit of an unprecedented number of bilateral trade deals. The United States has already completed bilateral FTA deals with Jordan (October 24, 2000), Singapore (May 6, 2003), Chile (June 6, 2003), Australia (May 18, 2004), Central American countries (the Central American Free Trade Agreement (“CAFTA”) includes Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua) (May 28, 2004), Morocco (June 15, 2004), and Bahrain (September 14, 2004). The United States is currently negotiating similar deals with Panama, Andean countries (Peru, Colombia, Bolivia, and Ecuador), Malaysia, Oman, Korea, Thailand, United Arab Emirates, and the Southern African Customs Union (“SACU”) members.⁸⁰ The United States proclaimed its bilateralist bias when it expressed its frustration at the collapse of the WTO Ministerial Conference held in Cancún in September 2003. The U.S. Trade Representative (“USTR”) Robert Zoellick announced that the United States would pursue bilateral trade agreements with “can do” countries, leaving behind “won’t do”

DEVELOPMENT AND REGIONAL/BILATERAL APPROACHES TO TRADE AND INVESTMENT LIBERALIZATION 3 (2004), available at http://www.iisd.org/pdf/2005/trade_rush_region.pdf.

⁷⁸ JAGDISH BHAGWATI, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION AND DEMOCRACY 309 (1998) [hereinafter BHAGWATI, A STREAM OF WINDOWS]. Section 301 refers to the U.S. statute which authorizes the U.S. government to impose sanctions against foreign trading partners in case of their breach of international trade law or any other unreasonable trade practices which harm the U.S. trade interests. 19 U.S.C. §§ 2411–2420 (2000).

⁷⁹ BHAGWATI, A STREAM OF WINDOWS, *supra* note 78, at 311 n.11.

⁸⁰ USTR, *Bilateral Trade Agreements*, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Sept. 1, 2006).

countries.⁸¹ In the same context, U.S. Senator Charles Grassley, Chairman of the Senate Finance Committee, proclaimed that the United States has a lot of “options” including bilateral trade negotiations.⁸²

Recent U.S. unilateralist trade policies have provoked reactionary moves among its trading partners, especially in East Asian countries. This brings us to the second analytical tool: the “Reactionary” lens. Heads of East Asian economies have recently announced a number of ambitious blueprints for bilateral or sub-regional trade agreements. Some of these agreements have been concluded and have already borne fruit.⁸³ Even Japan and Korea, which were traditionally called “Friends of GATT Article I (MFN),”⁸⁴ departed from their long-standing tradition of having no RTAs by signing an FTA with Singapore on January 13, 2002,⁸⁵ and with Chile on February 15, 2003.⁸⁶ Under the alleged “domino effect,”⁸⁷ ASEAN has also been active in creating sub-regional trade agreements with Northeast Asian trading partners (“ASEAN plus Three”) as well as with Australia and New Zealand (“ASEAN-AUS/NZ”), and with China (“ASEAN-China”).⁸⁸

While motivations behind this unparalleled regionalist zeal in East Asia vary, including a centripetal posture after the recent financial crisis,⁸⁹ and the emergence of China as a new economic superpower,⁹⁰ defensive

⁸¹ Robert B. Zoellick, Op-Ed., *America Will Not Wait for the Won't-Do Countries*, FIN. TIMES, Sept. 22, 2003, at 23.

⁸² The Office of the US Senator Charles Grassley, Memorandum: Collapse of Trade Negotiations in Cancún (Sep. 14, 2003), http://grassley.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=3582&Month=9&Year=2003.

⁸³ See generally APEC, *Member Economies' FTA/RTA Information*, http://www.apec.org/webapps/fta_rta_information.html (last visited Dec. 27, 2004) (providing an overview of current developments on RTAs/FTAs in East Asia and Asia Pacific).

⁸⁴ SCOLLAY & GILBERT, *supra* note 24, at 4.

⁸⁵ See Larry Jagan, *Japan Opens Its Markets*, BBC NEWS, Jan. 14, 2002, available at <http://news.bbc.co.uk/2/hi/business/175915.stm>.

⁸⁶ See Free Trade Agreement between the Republic of Korea and the Republic of Chile, available at http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaInd_e.asp.

⁸⁷ See SCOLLAY, *supra* note 8, at 7.

⁸⁸ See ASEAN Looks to Deepen Integration, *Forge New Trade Ties*, BRIDGES WKLY. TRADE NEWS DIG., Sept. 8, 2004, at 2, available at <http://www.ictsd.org/weekly/04-09-08/BRIDGESWeekly8-29.pdf>.

⁸⁹ See Won-Mok Choi, *Regional Economic Integration in East Asia: Prospect and Jurisprudence*, 6 J. INT'L ECON. L. 49, 49–50 (2003).

⁹⁰ For the last decade, China's increasing presence in East Asia, and in the world, and its growing prowess as a trading powerhouse has been nothing short of phenomenal. Its size and volume, both as an exporter and an importer in the region, is unsurpassed. China's rise has been both welcomed and feared by neighboring East Asian countries—depending on the perspectives those countries hold. Some worry about China's dominance in the region while others want to gain preferential access to China's huge market ahead of others, utilizing the first-mover advantage. These various calculations and motivations lead different countries to

reactions to the FTA policies of the United States are still a critical factor.⁹¹ The United States' recent aggressive bilateral/regional drive worldwide has put East Asian trading partners in a protective position. These countries are left few other options but to follow suit—without considering the long-term costs and benefits—merely to avoid getting left behind. One Asian commentator warned that “China hasn’t replaced the [United States]. But it’s eating away at America’s influence. This is going to keep happening unless Washington changes its ways.”⁹² This “reactionary regionalism”⁹³ among East Asian trading nations is reminiscent of a futile proposal in the early Nineties by Malaysian Prime Minister Mahathir Mohamad to create an “East Asia Economic Grouping” (“EAEG”) or an “East Asia Economic Caucus” (“EAEC”).⁹⁴ Although this emerging regionalism in East Asia may have been merely reactionary, it still impacts multilateralism negatively. The unenthusiastic participation in the recent WTO Hong Kong Ministerial Conference by major East Asian nations, such as China, Japan, and Korea, might be connected to the contemporary regionalist distraction in this region.⁹⁵

The third analytical tool is an “Expansionist” lens. One characteristic feature of Neo-Regionalism is its ever-expanding geographical reach. Pre-

choose different partners in their commitments to RTAs. See Jeffrey Robertson, *ASEAN Plus Three: Towards the World's Largest Free Trade Agreement?*, Australian Dep't. of Parliamentary Library, Research Note 2002–03, No. 19, Nov. 12, 2002, <http://www.apl.gov.au/library/Pubs/RN/2002-03/03rn19.htm>.

⁹¹ See Mari Pangestu & Sudarshan Gooptu, *New Regionalism: Options for East Asia*, in EAST ASIA INTEGRATES: A TRADE POLICY AGENDA FOR SHARED GROWTH 39, 40–41 (Kathie Krumm & Homi Kharas eds., 2004). See also *East Asian Trade: Everybody's Doing It*, ECONOMIST, Feb. 28, 2004, at 39–40.

⁹² Carlyle A. Thayer, *ASEAN Ten Plus Three: An Evolving East Asian Community?*, in 2 COMPARATIVE CONNECTIONS: AN E-JOURNAL ON EAST ASIAN BILATERAL RELATIONS 52 (2001), <http://www.csis.org/media/csis/pubs/0004q.pdf>.

⁹³ See generally Beeson, *supra* note 56. See also *East Asian Trade: Everybody's Doing It*, ECONOMIST, Feb. 28, 2004, at 39–40. A similar phenomenon can be located in the creation of APEC in that it could be viewed as a reaction, or a warning, to emerging regional blocs at that time, such as the European Union and NAFTA. See generally Sungjoon Cho, *Rethinking APEC: A New Experiment for a Post-Modern Institutional Arrangement*, in WTO AND EAST ASIA: NEW PERSPECTIVES, 381, 386–87 (Mitsuo Matsushita & Dukgeun Ahn eds., 2004) [hereinafter Cho, *Rethinking APEC*].

⁹⁴ See Beeson, *supra* note 56, at 17. But see Simon S. C. Tay, *Asia and the United States after 9/11: Primacy and Partnership in the Pacific*, 28-WTR FLETCHER F. WORLD AFF. 113, 127 (2004) (predicating that this reactionary regionalism would not undermine pre-existing bilateral relations between individual countries in East Asia and the United States.).

⁹⁵ See Raphael Minder & Richard McGregor, *Asian Nations Stick to Sidelines*, FIN. TIMES, Dec. 5, 2005, at 8 (reporting that China's government resources had been diverted to its increasing regional trade deals before the WTO Hong Kong Ministerial Conference); Philip Bowring, Op-Ed., *Silver Lining in WTO Talks*, INT'L HERALD TRIBUNE, Dec. 19, 2005, at 9 (observing that East Asia's recent regional policies reflected illusions that regionalism can be a substitute for the WTO).

existing RTAs tend to become *mega*-RTAs by adding new members (e.g., E.U. enlargement) or by merging with other RTAs⁹⁶ (e.g., Free Trade Agreement of the Americas ("FTAA"),⁹⁷ E.U.-MERCOSUR FTA).⁹⁸ Interestingly, however, such ambitious expansionist initiatives have exposed ironic limitations of the regionalist approach. Unlike simpler bilateral FTA projects, it has become harder to coordinate conflicting interests among an increased number of members under mega-RTAs.

For instance, there has been a good deal of internal conflict within the enlarged European Union over the new service directive, which is mainly due to old (developed) members' lukewarm attitudes toward new (developing) members' cost advantages in low-skilled labor in the service sector.⁹⁹ In another instance, the refusal of the United States and European Union to decrease farm subsidies stalemated the current FTAA initiative and the E.U.-MERCOSUR FTA deal, respectively. It appears that the big players are reluctant to make any concessions in agricultural protection to fellow RTA members for strategic reasons—in particular, to save bargaining chips for the WTO Doha Round negotiations.¹⁰⁰

In sum, Neo-Regionalism, which differs from regionalism under GATT in its intensity and profligacy, is characterized by the Unilateralist departure of the United States from the multilateral trade forum; a Reactionary emulation among the trading partners of the United States, especially East Asian nations, and the counterproductive Expansionist zeal of pre-existing RTAs.

⁹⁶ See William H. Lash, *The Decline of the Nation State in International Trade and Investment*, 18 CARDOZO L. REV. 1011, 1012 (1996) (observing a growing tendency to "merge" among trade blocs).

⁹⁷ See generally Jose Antonio Rivas-Campo & Rafael Tiago Juk Benke, *FTAA Negotiations: Short Overview*, 6 J. INT'L ECON. L. 661, 662–66 (2003) (describing the history of FTAA negotiations).

⁹⁸ See *The E.U.'s Relation with MERCOSUR*, EUROPEAN UNION COMMISSION OF EXTERNAL RELATIONS, http://ec.europa.eu/comm/external_relations/mercosur/intro/ (last visited Jan. 2, 2006).

⁹⁹ See Wolfgang Munchau, Comment, *Missed Chances to Revive Europe's Economy*, FIN. TIMES, Mar. 28, 2005, at 15.

¹⁰⁰ See *More Jaw-Jaw: MERCOSUR and the E.U.*, ECONOMIST, Oct. 30, 2004, at 44; *FTAA Talks at an Impasse*, BRIDGES WKLY. TRADE NEWS DIG., Apr. 8, 2004, at 9–10, available at <http://www.icts.org/weekly/04-04-08/BRIDGESWeekly8-13.pdf>; *FTAA: US-Brazil Standoff Dims Prospects for Miami Ministerial*, BRIDGES WKLY. TRADE NEWS DIG., Oct. 8, 2003, at 4, available at <http://www.icts.org/weekly/03-10-08/BRIDGESWeekly7-33.pdf>; *Much Wind and Little Light: Trade in the Americas*, ECONOMIST, Oct. 18, 2003, at 36; Jeffrey Schott, *Unlocking the Benefits of World Trade*, ECONOMIST, Nov. 1, 2003, at 66; Rivas-Campo & Benke, *supra* note 97, at 669. See also, SCOLLAY, *supra* note 8, at 4.

III. ASSESSING THE BROKEN EQUILIBRIUM: THE FRAGMENTATION OF WORLD TRADE

A. Methodology of Investigation

1. The Telos of World Trade as an Investigatory Criterion

Assessing the impact of the broken equilibrium between regionalism and globalism, i.e., regionalist fragmentation, is a daunting task, especially when such a task is grounded on an “empirical” investigation. Trade statistics and other information on RTAs are often difficult to collect.¹⁰¹ Even if the data were available, different interpretations of the same data could lead to different assessments of RTAs. Perhaps the inconsistency in interpreting data attests to economists’ diverging views on regionalism.¹⁰² Yet, a more serious caveat of conducting an empirical study would be its incapability in showing the cumulative, interrelated effects of existing RTAs on world trade.

This article does not pursue an empirical approach to analyzing the effect of regionalism on world trade. Instead, it adopts a “normative” methodology that predicates its assessment on the very objective and purpose (*telos*) of the multilateral trading system. The *telos* not only functions as a decisive means of interpreting trade rules, but it is also a criterion with which to appraise the normativity of various trade (or trade related) phenomena, such as regionalism, and their effects. However, the WTO’s *telos* is dynamic and evolving; therefore, understanding the *telos* of the multilateral trading system necessitates a review of the system’s institutional transformation throughout its history.

2. The Tripartite Telos from Three Constitutional Moments

The first constitutional moment of the modern multilateral trading system was the creation of GATT in 1947. GATT was one of the pillars of the Bretton Woods arrangement developed by the Allies as a post-war international economic order. GATT incorporated painful lessons learned from the mutually destructive economic balkanization during the inter-war period that contributed to WWII. Unsurprisingly, GATT aimed to “liberalize” international trade through reducing tariffs, quotas, and other trade barriers.¹⁰³ GATT was a great success: international trade increased

¹⁰¹ See WTO, Under Transformation, *supra* note 71, at 13 (observing that “dispute settlement awareness” discourages members of regional trading blocs from coming forward with information on their regional policies which might be inconsistent with the WTO rules).

¹⁰² See Cho, *A New Perspective*, *supra* note 11, at 434–35 (regarding empirical debates among economists on the effect of regionalism).

¹⁰³ See GATT, *supra* note 4, pmbl.

enormously,¹⁰⁴ which allowed once poor countries to trade their way out of abject poverty.¹⁰⁵

As GATT rounds of tariff reduction negotiations continued, conventional trade barriers, such as tariffs and quotas, declined substantially.¹⁰⁶ At the same time, GATT contracting parties began to enact increasingly domestic regulations that emphasized the quality of life in areas of environment, human health, and human safety.¹⁰⁷ However, GATT's "pro-trade" bias,¹⁰⁸ i.e., its staunch commitment to trade liberalization, made it ill-equipped to deal with these domestic regulatory changes because such welfare regulations inevitably result in trade restrictions, especially in the highly interdependent world.¹⁰⁹ Uruguay Round negotiations (1986–1994) addressed these new concerns, which eventually led to the creation of the WTO in 1995.

The launch of the WTO is the second constitutional moment of the modern multilateral trading system. The WTO has overcome GATT's pro-trade bias by responding more effectively to the aforementioned new challenges.¹¹⁰ For instance, "rights" to regulate were explicitly acknowledged in side agreements, such as the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS") and the

¹⁰⁴ During the period of 1965 to 1999, an average annual growth rate of gross domestic product ("GDP") marks 4.2% in the low and middle income countries and 3.2% in the high income countries; during the same period, an average annual growth rate of export of goods and services marks 5.3% and 5.9%, respectively. THE WORLD BANK, 2001 WORLD DEVELOPMENT INDICATORS 24–27 (2002).

¹⁰⁵ See, e.g., THE MULTILATERAL TRADING SYSTEM IN A GLOBALIZING WORLD (Lee-Jay Cho & Yoon Hyung Kim eds., 2000).

¹⁰⁶ "Regulatory régimes have been brought into greater interaction, as the removal of direct barriers to the flows of goods and money between states (tariffs/quotas and exchange controls) has shifted attention towards regulatory difference as a barrier to entry of commodities or capital." Sol Picciotto, *The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 89, 89 (William Bratton et al. eds., 1996).

¹⁰⁷ See Orly Lobel, *The Renew Deal, The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 364–65 (2004).

¹⁰⁸ See Hannes L. Schloemann & Stefan Ohlhoff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT'L L. 424, 451 (1999).

¹⁰⁹ GLOBAPHOBIA: CONFRONTING FEARS ABOUT OPEN TRADE 89–90 (Gary Burtless et al. eds., 1998).

¹¹⁰ Cf. Ernst-Ulrich Petersmann, *The Transformation of the World Trading System Through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161, 189 (1995) (arguing that the 1994 WTO Agreement "completes the original design of the Bretton Woods system," and "reduces the existing fragmentation of international economic law, by a 'global integration law' for international movements of goods, services, persons, investments and payments").

Agreement on Technical Barriers to Trade (“TBT”). Therefore, the *telos* of the WTO overcame the narrow anti-protectionist agenda of GATT by embracing a much broader range of matters relating to “integration” and “sustainable development.”¹¹¹ Thus, the WTO presents a more mature approach toward the dual objectives of free trade and regulatory autonomy.

Despite the advances made by the WTO, it has not been able to improve the economic welfare of poor people and nations. While certain trading nations, particularly the traditional North and the New Globalizers (e.g., China and India), have profited from the WTO system, many poor countries have failed to benefit from the multilateral trading system.¹¹² Ironically, the global income gap has actually grown faster since the creation of the WTO.¹¹³ Disappointment over this situation contributed to the collapse of the 1999 WTO Ministerial Meeting in Seattle,¹¹⁴ and finally led to the establishment of the “Development Round” in Doha in 2001, which focused on development and poverty issues in trade negotiations.¹¹⁵ The Doha Development Round represents the third constitutional moment of the modern multilateral trading system.

In conclusion, these three constitutional moments collectively constitute the *telos* of the current global trading system—a tripartite objective of free trade, adequate regulation and development.

¹¹¹ WTO Agreement, *supra* note 5, pmbl. Professor Cottier also notes “while the GATT was an agreement the purpose of which was almost exclusively the reduction of trade barriers, the WTO increasingly assumes *constitutional* functions in a globalizing economy.” Thomas Cottier, *The WTO and Environmental Law: Some Issues and Ideas*, (Trade & Development Centre Essay Series), available at <http://web.archive.org/web/20040502031019/http://www.itd.org/issues/essay1.htm> (emphasis added). Cf. Brian F. Fitzgerald, *Trade-Based Constitutionalism: The Framework for Universalizing Substantive International Law?*, 5 U. MIAMI Y. B. INT’L L. 111, 129 (1996–97) (arguing that “[t]he Uruguay Round of the GATT has presented us with a trade structure that no longer seeks only to deregulate or regulate in the name of some narrow universal principle of free trade, but that seeks to regulate sovereignties for the purpose of finding universality.”).

¹¹² See United Nations Millennium Declaration, G.A. Res. 55/2, para. 5, U.N. Doc. A/RES/55/2 (Sept. 18, 2000), available at <http://www.un.org/millennium/declaration/ares552e.pdf> (“For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed.”).

¹¹³ See, e.g., *Global Gap Rising, World Bank Study Shows*, UN WIRE, Jan. 18, 2002, available at http://www.unwire.org/unwire/20020118/23173_story.asp.

¹¹⁴ See generally, Sylvia Ostry, *Making Sense of It All: A Post-Mortem on the Meaning of Seattle*, in SEATTLE, THE WTO, AND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 81 (Roger B. Porter & Pierre Sauvé eds., 2000).

¹¹⁵ World Trade Organization, Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

B. Investigating Fragmentation: Three Teleological Failures

1. Trade Failure

Under the Vinerian test, an RTA may be justified if effects of trade creation exceed those of trade diversion. In other words, even though the outside world may suffer in the short-term from trade-diverting effects of an RTA, it “can gain in the long-run only as the result of the general diffusion of the increased prosperity” of the RTA.¹¹⁶ However, this *pre-formation* presumption which provides the rationale of GATT Article XXIV has been put to test by empirical studies which focus on *post-formation* effects of RTAs. Economists generally believe that RTAs are inherently inferior in trade creation to a multilateral trading system. For instance, Glenn Harrison demonstrated that multilateral trade liberalization results in significantly larger gains to world trade creation than the network of RTAs.¹¹⁷ This broad observation also reverberates in studies on particular RTAs. In analyzing the trade impact of MERCOSUR, Alexander Yeats noted that because RTA members often trade with each other in goods in which they have little comparative advantage, RTAs detrimentally impact members and non-members alike.¹¹⁸ In a similar vein, John Romalis revealed that while NAFTA augmented North American output and boosted prices in many well-shielded sectors by excluding non-members’ imports, it eventually failed to create a significant welfare effect on non-members.¹¹⁹

Global welfare loss is even more prominent when RTAs exclude major products from their coverage, such as agricultural products and textiles. RTAs usually do not address the “tariff peaks” in major products, nor do they usually adopt a “comprehensive” mode of liberalization of these

¹¹⁶ VINER, *supra* note 46, at 44.

¹¹⁷ GLENN W. HARRISON ET AL., RULES OF THUMB FOR EVALUATING PREFERENTIAL TRADING ARRANGEMENTS: EVIDENCE FROM COMPUTABLE GENERAL EQUILIBRIUM ASSESSMENTS 3 (World Bank Development Research Group, WPS 3149, 2003), available at <http://econ.worldbank.org/view.php?type=5&id=30278>.

¹¹⁸ Alexander J. Yeats, *Does Mercosur's Trade Performance Raise Concerns about the Effects of Regional Trade Arrangements?*, 12 WORLD BANK ECON. REV. 1, 1 (1998), available at <http://www.worldbank.org/research/journals/wber/revjan98/pdf/article1.pdf>. See also GLENN W. HARRISON ET AL., REGIONAL, MULTILATERAL, AND UNILATERAL TRADE POLICIES OF MERCUSOR FOR GROWTH AND POVERTY REDUCTION IN BRAZIL 32 (World Bank Development Research Group, WPS 3051, 2003), available at <http://econ.worldbank.org/view.php?type=5&id=26556> (estimating that multilateral trade liberalization of 50% tariff reduction would provide worldwide gains tantamount to four times the benefits of either FTAA or E.U.-MERCUSOR).

¹¹⁹ JOHN ROMALIS, NAFTA'S AND CUSFTA'S IMPACT ON INTERNATIONAL TRADE 1 (National Bureau of Econ. Research, Working Paper No. 11059, 2005), available at <http://nber.org/papers/w11059>.

products.¹²⁰ For instance, while trade creation might outweigh trade diversion in manufactured products¹²¹ under the E.C., its overall contribution to global welfare is questionable in the face of the notorious “Common Agricultural Policy”¹²² which blatantly shelters European farmers from foreign competition. Also, under MERCOSUR, “industrial realpolitik” in Argentina and Brazil blocked the introduction of fully liberalized trade in the auto industry, despite a strong shift to economic liberalization.¹²³

This trade failure, i.e., global welfare loss due to serious trade diversion and sector specific protectionism, can be traced back to old RTAs, such as NAFTA and MERCOSUR. However, such trade failure under GATT was more anecdotal than systemic. It certainly did not lead to serious fragmentation of world trade since the original equilibrium could be maintained with a relatively small number of RTAs. It is through expansion of pre-existing RTAs and propagation of countless RTAs under Neo-Regionalism that trade failure has become a persistent pattern and thus begun to seriously compartmentalize global trade.

Trade failure under Neo-Regionalism is likely to be most prominent in politically sensitive products that have long been sheltered from foreign competition. For instance, when Turkey formed a customs union with the E.C. in 1996, Turkey was forced to adopt the E.C.’s common external trade policies, which required Turkey to introduce new quotas on imports of textiles and clothing products, diverting trade from non-E.C. members.¹²⁴ Likewise, on May 1, 2004, the new Member States of the European Union—Poland, the Czech Republic, Estonia, Lithuania, Latvia, Hungary, Malta, Cyprus, Slovenia and Slovakia—began to apply an E.U. quota on imports of textiles and clothing from certain countries.¹²⁵ The net result from an expansion of a pre-existing RTA, i.e., the European Union, was enormous trade diversion of potential trade flows from non-member countries to member countries.

More often than not, these sensitive products are also carved out from

¹²⁰ See WTO, *Under Transformation*, *supra* note 71, at 10.

¹²¹ POMFRET, *supra* note 27, at 267 (quoting PETER ROBSON, *THE ECONOMICS OF INTERNATIONAL INTEGRATION* 200 (2d ed. 1984)).

¹²² *Id.* at 268.

¹²³ Stephen P. Sorensen, *Open Regionalism or Old-Fashioned Protectionism?: A Look at the Performance of MERCOSUR’s Auto Industry*, 30 U. MIAMI INTER-AM. L. REV. 371, 398 (1998).

¹²⁴ Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (Oct. 22, 1999), available at [http://www.worldtradelaw.net/reports/wtoab/turkey-textiles\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/turkey-textiles(ab).pdf) [hereinafter *Appellate Body Report, Turkish QRs*].

¹²⁵ E.U., *Notice to Importers: Imports into the Community of Textile and Clothing Products After 1 May 2004 Following the Enlargement* 2004 O.J. (C 68/08), available at <http://trade-info.cec.eu.int/textiles/documents/204.pdf>.

the scope of trade liberalization under RTAs. This frustrating practice of targeted omission has become a hallmark of Neo-Regionalism. The Japan-Singapore FTA (2003) excluded numerous agricultural and textile products from its reach.¹²⁶ Both the U.S.–Australia FTA (2004) and the Central American Free Trade Agreement (“CAFTA”) (2004) do not cover sugar.¹²⁷ Omissions have not been limited to traditional commodities. The Mexico-Japan FTA (2004) left out, *inter alia*, automobile maintenance services, business services, construction, entertainment, and telecommunication, in addition to traditional sectors such as agriculture, forestry, fisheries, and livestock.¹²⁸ Such typical proclivity of RTAs toward omitting politically sensitive sectors and focusing on “less risky” businesses further “cement[s] domestic constituencies” which resist liberalization and reform, and thus discourage those sectors from being discussed and negotiated in the multilateral forum.¹²⁹ In other words, RTAs not only “failed to crack the hardest nuts”¹³⁰ but also further hardened them.

Even if certain products are *included* in the coverage of RTA, and thus are subject to duty-free access, the convoluted nature of RTAs’ “rules of origin” hinders trade creation—the full materialization of improved market access from RTAs. Rules of origin refer to domestic regulations that determine the origin of imported products.¹³¹ An RTA needs rules of origin

¹²⁶ See Choi, *supra* note 89, at 52.

¹²⁷ See U.S.–Australia Free Trade Pact Omits Sugar, Increases Transparency on Pharmaceuticals, 21 INT’L TRADE REP. 260 (Feb. 12, 2004); *Five Get Anxious; Central America Trade*, ECONOMIST, May 29, 2004, at 38.

¹²⁸ Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, Japan-Mex., Sept. 17, 2004, available at http://www.sice.oas.org/Trade/JPN_MEXDraftEPA_e/JPN_MEXind_e.asp [hereinafter Mexico-Japan FTA].

¹²⁹ *Id.* at 10.

¹³⁰ OECD, REGIONALISM, *supra* note 7, at 19.

¹³¹ Rules of origin are necessary for differentiating, or discriminating, among competitive imports. See Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 FORDHAM INT’L L.J. 572, 574–76 (2003). Of course, we would not need rules of origin if we accorded equal treatment to all imported goods. In the United States, products freely pass over various states’ borders without needing to demonstrate their origins (e.g., made in Illinois). Yet, in the realm of international trade, trading nations still need rules of origin either to selectively *benefit* other trading partners, as with preferential tariffs (preferential rules of origin); or, to selectively *penalize* them, as with antidumping measures (non-preferential rules of origin). The former type of rules of origin is critical to forming and maintaining RTAs: in order to maintain preferences, RTAs must prevent “trade deflection.” WTO, Under Transformation, *supra* note 71, at 10. Trade deflection occurs when non-originating goods from non-members enjoy a free ride (duty-free access) to RTA members’ markets. In other words, preferential rules of origin are a “screening” mechanism for RTAs to determine which originating goods from members are entitled to preferential treatment. See Paul Brenton, *Rules of Origin in Free Trade Agreements*, WORLD BANK TRADE NOTE 1,

from its very nature because preferential tariffs and other treatment are accorded exclusively to products from member countries (originating goods). Complex rules of origin would not be necessary if every product was 100% made in a certain country. However, because manufacturing processes are often spread over multiple nations, it is daunting to attribute a finished good to any *one* nation.¹³²

If an RTA has liberal rules of origin, more products are regarded as originating goods and thus entitled to preferential treatment. However, if an RTA has strict rules of origin, more products are denied preferential treatment in the regional market. The latter scenario panders to local protectionism while deepening trade diversion. Unfortunately, recent RTAs follow the latter scenario. For example, the recent Japan-Thailand FTA deal did not resolve acrimony over rules of origin on Thai food and agricultural products. Thailand, as one of the world's largest tuna canners, wants Thai tuna can exports to Japan to benefit from low preferential tariffs, while Japan wants to apply those low tariffs only to those tuna cans made directly out of tuna harvested in Thailand.¹³³ If the Japan's position prevails, foreign tuna exports to Thailand will be diverted, and Thailand's tuna canning manufacture may suffer, while Japanese tuna canners and tuna producers may be protected. Likewise, the Mexico-Japan FTA introduced over 100 pages of new rules of origin under the title of the "Annex 4 referred to in Chapter 4: Specific Rules of Origin."¹³⁴ These labyrinthine rules cover nearly all the products ranging from food to automobiles.

Beyond protectionism, these voluminous and complicated rules of origin also impose enormous transaction costs and administrative burdens even to those businesses within the bloc. Although these rules of origin are often "hidden by a facade of technical and seemingly innocuous details,"¹³⁵ those devilish details often harass businesses and overburden the customs offices.¹³⁶ For example, many U.S. importers elect not to fill out certificates of NAFTA origin because of the burdensome paperwork and the fear of

No. 4, May 29, 2003, available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/TradeNote4.pdf>.

¹³² See Joseph A. LaNasa, III, *Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them*, 90 AM. J. INT'L L. 625, 629-34 (1996) (regarding various determinants of origin such as the "last substantial transformation" and the "value-added percentage").

¹³³ Amy Kazmin, *Questions Remain After Thai-Japan Trade Deal Agreed*, FIN. TIMES, Aug. 2, 2005, at 5.

¹³⁴ Mexico-Japan FTA, *supra* note 128, ch. 4.

¹³⁵ Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 410 (2002).

¹³⁶ See, e.g., WTO, *Under Transformation*, *supra* note 71, at 11; OECD, *REGIONALISM*, *supra* note 7, at 19; Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT'L L. 539, 580-81 (1995).

being penalized for filing an improper claim.¹³⁷ Instead, these importers volunteer to pay tariffs that ostensibly should not have been levied on the products being imported. Similarly, despite the existence of duty free access provided by free trade agreements between the European Union and Eastern European countries, many clothing products made in those countries enter into the European market under an alternative customs procedure. The main reason for the alternative procedure is the costs and uncertainties in proving the origins of Eastern European imports.¹³⁸ This disarray of rules of origin, which is often dubbed the “spaghetti bowl,”¹³⁹ is only exacerbated as more RTAs are added to the landscape of the global marketplace.

Unfortunately, the WTO’s response to this trade failure has been mostly ineffective. First of all, although GATT Article XXIV governs the formation of RTAs via its ostensibly draconian requirements, it has not demonstrated any real bite, mostly because of its arcane language. Nor has the CRTA been capable of determining the WTO-legality of individual RTAs brought to the WTO Secretariat for review. No RTA has ever been rejected for violating Article XXIV. This “legal vacuum” further invites proliferation of RTAs.¹⁴⁰ Likewise, while the WTO Agreement on Rules of Origin attempts to harmonize “non-preferential” rules of origin,¹⁴¹ it does not address “preferential” rules of origin which structure RTAs. Without any multilateral discipline in administering preferential rules of origin, RTAs can effectively divert imports from non-member countries by manipulating rules of origin, thereby becoming fortress-like economic blocs. Given the increased proliferation rate of RTAs, this fortress effect seriously fragments world trade.

Nonetheless, some scholars attempt to rationalize RTAs under the euphemistic banner of “competitive regionalism.”¹⁴² For instance, Fred Bergsten believes that the current U.S. bilateral/regional drive “place[s]

¹³⁷ See Tim Tatsuji Shimazaki, *Proof of Origin as a Trade Barrier*, reprinted in NAFTA A PROBLEM-ORIENTED COURSEBOOK 65–66 (RALPH H. FOLSOM, MICHAEL WALLACE GORDON, & DAVID LOPEZ) (2000).

¹³⁸ See Brenton, *supra* note 131, at 5.

¹³⁹ BHAGWATI, A STREAM OF WINDOWS, *supra* note 78, at 290.

¹⁴⁰ See Cho, *A New Perspective*, *supra* note 11, at 435–43.

¹⁴¹ Agreement on Rules of Origin, Annex 1 A, WTO Agreement, *supra* note 5, art. 1, para. 2 (“Rules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas.”).

¹⁴² See Alvin Hilaire & Yongzheng Yang, *The United States and the New Regionalism/Bilateralism*, 38 J. WORLD TRADE 603, 608 (2004).

pressure on non-members of individual free trade agreements to join the group itself or to conclude broader agreement[s].”¹⁴³ This position, no matter how plausible it may sound at first blush, fails to recognize that such regionalism at the same time deprives WTO members of the incentives and resources required to promote the multilateral trading system. In particular, trading nations are likely to delay certain liberalization plans, keeping them as “bargaining chips” for future bilateral/regional deals.¹⁴⁴ Moreover, this competition may pit one bloc against another and precipitate further economic balkanization.¹⁴⁵ In other words, such a rationalization neglects the “high-risk” of competitive protectionism, which has already been observed in the reactionary regionalism of East Asia.¹⁴⁶ Even if we accept that competitive regionalism could lead to competitive trade liberalization in theory, as a practical matter, this is still unlikely to transpire. According to one study, APEC would require as many as 210 FTAs just to encompass all of its 21 members’ bilateral trading relationships.¹⁴⁷

In sum, without multilateral disciplines, RTAs’ “embedded mercantilism,”¹⁴⁸ together with their intricate rules of origin, produce trade-diverting effects vis-à-vis the rest of the world. The myriad of RTAs enacted under Neo-Regionalism principles, most of which are left unchecked by the multilateral norms, cause trade diversion, fragment world trade, severely undermine the MFN-based WTO system, and eventually lead to an inefficient allocation of global resources.

2. Regulatory Failure

The recent RTAs usually contain chapters on social regulations, such as human health, labor, and the environment. However, these social provisions are often inconsistent with multilateral rules in their regulatory scope and level.¹⁴⁹ For instance, in the area of food safety, RTAs more readily “bow” to individual members’ regulatory preferences.¹⁵⁰ Unsurprisingly, the large number of these regional social charters in

¹⁴³ Fred Bergsten, *A Competitive Approach to Free Trade*, FIN. TIMES, Dec. 5, 2002, at 13.

¹⁴⁴ See SCOLLAY, *supra* note 8, at 4.

¹⁴⁵ See FRANKEL, *supra* note 27, at 210.

¹⁴⁶ See *supra* Parts II:D.; see also Hilaire & Yang, *supra* note 142, at 608; Bernard K. Gordon, *A High-Risk Trade Policy*, 82 FOREIGN AFF. 105, 108–18 (2003).

¹⁴⁷ See SCOLLAY, *supra* note 8, at 8.

¹⁴⁸ Beeson, *supra* note 56, at 10.

¹⁴⁹ *Id.* at 4.

¹⁵⁰ See COSBEY ET AL., *supra* note 77, at 26; see generally Grant E. Isaac, *Food Safety and Eco-Labeling Regulations: A Case of Transatlantic Regulatory Regionalism?*, in REGIONALISM, MULTILATERALISM, AND ECONOMIC INTEGRATION: THE RECENT EXPERIENCE 227–52 (Gary P. Sampson & Stephen Woolcock eds., 2003).

different RTAs precipitates global regulatory morass. Although RTAs may act as regulatory laboratories under certain circumstances,¹⁵¹ absent a multilateralizing process, divergent regulations among RTAs may also create regulatory clashes.¹⁵² To wit, a “subfield consolidation,” in which “larger, but still uncoordinated regionalized bumper cars will carom around” the international arena, dampens prospects of multilateral regulatory convergence.¹⁵³ This “regulatory gridlock” under the web of RTAs complicates any multilateral efforts to establish a consistent and coherent regulatory norm, yet at the same time has serious implementation problems of its own.¹⁵⁴

A closer examination of social charters in recent RTAs reinforces the fear of this regulatory divergence and/or regulatory clash. For instance, the U.S.-Jordan FTA includes provisions hinting at a linkage between trade and labor,¹⁵⁵ which may be inconsistent with the regulatory consensus that the WTO Members have already reached in this area. At the Singapore Ministerial Conference in 1996, the WTO Members announced that labor issues should be addressed by the International Labor Organization (“ILO”), and not be abused for protectionist purposes. They reiterated this position at the Doha Ministerial Conference in 2001.¹⁵⁶ In the area of intellectual property rights, the U.S.-Jordan FTA explicitly overrides the Trade-Related Aspects Intellectual Property Rights (“TRIPS”) by stipulating that any marketing approval of pharmaceutical products should

¹⁵¹ See Cho, *A New Perspective*, *supra* note 11, at 454–57 (discussing “open regionalism” in APEC).

¹⁵² Michael Malloy employed a “bumper car” model to highlight the potential risk of regulatory clash between different jurisdictions. Michael P. Malloy, *Bumper Cars: Themes of Convergence in International Regulation*, 60 *FORDHAM L. REV.* S1, S21–22 (1992) (arguing that without a multilateralized solution in some important regulatory areas (e.g., banking regulation) backed by a strong force, regulatory convergence still remains prospective, “leav[ing] us with a stultifying pattern of subfield consolidation in which larger, but still uncoordinated, regionalized bumper cars will carom around the internationalized area of financial services.”).

¹⁵³ *Id.*; cf. Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 *MICH. J. INT’L L.* 903, 904 (2004) (warning against “self-contained islands of international law, de-linked from other branches of international law” due to regulatory fragmentation).

¹⁵⁴ WTO, Under Transformation, *supra* note 71, at 12 n.36.

¹⁵⁵ U.S.-Jordan Joint Statement on WTO Issues, Oct. 24, 2000, *available at* <http://www.sice.oas.org/Trade/us-jrd/WTOISS.asp> (“4. The Parties support the participation of the World Trade Organization in discussions concerning the relationship between the rights of workers and international trade.”).

¹⁵⁶ World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, *available at* http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm; World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/1, para. 8, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

conform to the FTA, not the TRIPS.¹⁵⁷

FTA supremacy in this field may undermine the WTO's laboriously reached multilateral regulatory consensus, considering that WTO Members have adopted a series of special regulations under TRIPS to give the poor better access to certain pharmaceutical products.¹⁵⁸ RTA "templates,"¹⁵⁹ which may be inconsistent with WTO rules and policies, impede regulatory harmonization through more functionally competent international regulatory agencies (or conventions), such as the ILO and numerous Multilateral Environmental Agreements ("MEAs"). Moreover, fragmented rule-making resulting from RTA templates diverts political capital, public attention, and other negotiating resources from the multilateral process.¹⁶⁰ Worse, the cost of such diversion is disproportionately borne by poor countries with little means.¹⁶¹

Markedly, this regulatory failure can be considered yet another trade failure because regulatory fragmentation or heterogeneity itself is a trade barrier in the global context. Producers from non-member countries must bear additional compliance costs when exporting to RTA markets with disparate regulations.¹⁶² More often than not, such regulatory barriers completely block non-members' market access. For instance, U.S. soybean producers who employ certain biotechnology skills in their production may not be able to export their products to the European Union because of the European Union's different regulations on genetically modified foods.¹⁶³

¹⁵⁷ Charlene Barshefsky, USTR, Side Letter on Marketing Approval of Pharmaceutical Products, Oct. 24, 2000, available at <http://www.sice.oas.org/Trade/us-jrd/letter1.asp>.

¹⁵⁸ See World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2001) [hereinafter Declaration on TRIPS]; World Trade Organization, Ministerial Implementation-Related Issues and Concerns, WT/MIN(01)/17, 41 I.L.M. 757 (2002); World Trade Organization Council for Trade-Related Aspects of Intellectual Property Rights, *Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, IP/C/41 (Dec. 6, 2005); World Trade Organization General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 2, 2003) (adopted Aug. 30, 2003) [hereinafter *Implementation 6*].

¹⁵⁹ CB Report, *supra* note 6, at 23.

¹⁶⁰ See United Nations Conference on Trade and Development, *Multilateralism and Regionalism: The New Interface, Chapter II: Remarks by Mr. Francisco Thompson-Flôres*, at 24, UNCTAD/DITC/TNCD/2004/7 (2005), available at http://www.unctad.org/en/docs/ditctncd20047ch2_en.pdf.

¹⁶¹ Hilaire & Yang, *supra* note 142, at 608 (2004).

¹⁶² See OECD, REGIONALISM, *supra* note 7, at 17; see also Mallet & Fifield, *supra* note 2 (quoting Michael Ducker).

¹⁶³ See Request for the Establishment of a Panel by the United States, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/23 (Aug. 8, 2003).

GATT Article XXIV once again fails to remedy this situation. First, since the Article only concerns the “formation” of RTAs, most social charters and regulations which are created after the formation are therefore outside of the Article’s jurisdiction.¹⁶⁴ Second, even if the Article, in particular paragraph 5, were applied to post-formation regulations, it would be a daunting, if not impossible, task to “quantify” the precise trade-restrictiveness of these regional regulatory schemes on an *ex ante* basis, to determine whether they constitute an undue burden to non-members.¹⁶⁵ Third, Article XXIV is silent on whether an entire RTA should be void when a regulatory scheme fails to meet the Article’s requirements.¹⁶⁶ The weaknesses of the Article contribute to the proliferation of social charters in RTAs.

In sum, various regional regulatory templates under RTAs often contradict regulatory consensus established in the multilateral setting. The proliferation of these regulatory templates and resultant regulatory fragmentation also complicate global regulatory harmonization and thus severely hinders global trade. It is more apt to describe these titular “WTO-plus” RTAs as having a “WTO-minus” impact on the multilateral trading system.¹⁶⁷ The recent emergence of “cross-regional” RTAs has only increased the intensity of this fragmentation, which adds yet another layer of complexity to the existing regulatory heterogeneity.¹⁶⁸

3. Development Failure

The proliferation of RTAs aggravates the developmental disparity of trading nations, including uneven distribution of benefits from free trade. In general, large regional blocs, such as the European Union, may increase their internal welfare, but impoverish smaller non-members and widen the

¹⁶⁴ See GATT, *supra* note 4, art. XXIV, para. 2(b), at 270 (“*Provided that the duties and other regulations of commerce imposed by, or any margin of preference maintained by, any such union or agreement in respect of trade with other contracting parties shall not on the whole be higher or more stringent than the average level of the duties and regulations of commerce or margins of preference applicable in the constituent territories prior to the formation of such union or the adoption of such agreement*” (second and third emphases added)).

¹⁶⁵ *Id.* (“*Provided that the duties and other regulations of commerce imposed by, or any margin of preference maintained by, any such union or agreement in respect of trade with other contracting parties shall not on the whole be higher or more stringent than the average level of the duties and regulations of commerce or margins of preference applicable in the constituent territories prior to the formation of such union or the adoption of such agreement*” (second, third and fourth emphases added)).

¹⁶⁶ See GATT, *supra* note 4, art. XXIV, at 268–72.

¹⁶⁷ See generally CB Report, *supra* note 6, at 23.

¹⁶⁸ See WTO, Under Transformation, *supra* note 71, at 8; see also WTO Committee on Regional Trade Agreements [WTO-CRTA], *Note by the Secretariat: Mapping of Regional Trade Agreements*, WTO-CRTA Doc. WT/REG/W/41 (Oct. 11, 2000).

gap between rich and poor countries.¹⁶⁹ According to Ben Zissimos and David Vines, bloc expansion creates a “terms of trade” gain for the bloc members at the expense of non-members, especially smaller ones.¹⁷⁰ In other words, while members of large blocs can enhance their economic welfare through a deeper internal integration and resultant economies of scale, smaller non-member economies’ exports to these blocs are continuously threatened by these artificial terms-of-trade gains by large blocs.

Additionally, small, poor trading nations may still suffer even as members of RTAs with large, rich nations. The “hub and spoke” model provides a powerful tool with which to analyze development failure of North-South RTAs. A hub (a large, rich country) can enjoy free access to the spokes’ (small, poor countries’) markets to the benefit of its export industries, while at the same time benefiting its import industries by providing access to the spokes’ cheap raw materials.¹⁷¹ However, the spokes cannot benefit in the same way, unless they form a web of RTAs (a “rim”) amongst themselves.¹⁷² Even if the spokes can experience an initial improvement in market access to the hub, such benefits tend to evaporate when multilateral trade liberalization subsequently lowers trade barriers.¹⁷³ Also, the spokes, not the hub, suffer most welfare loss due to the exclusion of important sectors, such as agriculture, from the North-South RTAs.¹⁷⁴ Alvin Hilaire and Yongzheng Yang demonstrated that the exclusion of agricultural liberalization from the U.S.-Chile FTA resulted in substantial welfare loss to Chile, with no major negative impact on the United States.¹⁷⁵

Dominique van der Mensbrugghe, Richard Newfarmer, and Martha Denisse Pierola confirmed through an economic model the existence of this developmentally pernicious effect of the recent trend of bilateral deals between North and South.¹⁷⁶ Using the Global Trade Analysis Project database, they performed a simulation based on a hypothesis that all

¹⁶⁹ Ben Zissimos & David Vines, *Is the WTO's Article XXIV a Free Trade Barrier? passim* (Centre for the Study of Globalisation and Regionalisation, CSGR Working Paper No. 49/00, 2000), available at <http://www2.warwick.ac.uk/fac/soc/csgr/research/workingpapers/2000/wp4900.pdf>.

¹⁷⁰ *Id.* at 33.

¹⁷¹ See, e.g., Garcia, *supra* note 136, at 557–58.

¹⁷² *Id.*

¹⁷³ See Hilaire & Yang, *supra* note 142, at 622.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 613 tbl.3, 617–18, 619 tbl.5.

¹⁷⁶ DOMINIQUE VAN DER MENSBRUGGHE, RICHARD NEWFARMER AND MARTHA DENISSE PIEROLA, *Regionalism vs. Multilateralism?*, in TRADE, DOHA, AND DEVELOPMENT: WINDOW INTO THE ISSUES 313, 313 (Richard Newfarmer ed., 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:20732399~pagePK:148956~piPK:216618~theSitePK:239071,00.html>.

developing countries would sign bilateral trade agreements with rich countries, such as the United States, the European Union, Japan, and Canada.¹⁷⁷ The result was truly revealing. While multilateral trade liberalization would bring developing countries a gain of 109 billion dollars in 2015, bilateral deals with rich countries would cause them a loss of twenty-two billion dollars in the same year.¹⁷⁸ Moreover, such loss would be concentrated disproportionately on low income countries (nineteen billion dollars) over middle income countries (2.6 billion dollars).¹⁷⁹

More seriously, however, parties to hub-and-spoke FTAs are vulnerable to exploitation due to an inherent power disparity between parties.¹⁸⁰ Jagdish Bhagwati once criticized the “FTA-cum-301 selfish hegemon strategy” of the United States, which positions the United States as a hub that extracts far superior terms from its bilateral FTA spokes.¹⁸¹ This selfish hegemony is engineered by the aggressive unilateralism embedded in Section 301,¹⁸² which was enacted to remedy allegedly unfair trade practices adopted by foreign countries and thus protect commercial interests of domestic producers.¹⁸³ Leftist development theorists might agree with Bhagwati’s criticism. The “dependency theory” casts a gloomy vision over free trade initiatives, such as FTAs.¹⁸⁴ It contends that a “center” (powerful country) exploits “peripheries” (less powerful trading partners).¹⁸⁵ It was in this context that the World Social Forum held in Porto Alegre, Brazil in January 2005 sounded a warning of immiserizing effects of these North-South RTAs. Some participants, including the Africa Trade Network (“ATN”), argued that the ongoing “Economic Partnership Agreement (“EPA”)” negotiations between the European Union and African, Pacific, and Caribbean countries demand far deeper concessions from the poor than would otherwise be required under the WTO.¹⁸⁶ The

¹⁷⁷ *Id.* at 315–16.

¹⁷⁸ *Id.* at 316, 317 tbl.1.

¹⁷⁹ *Id.* at 317 tbl.1.

¹⁸⁰ Mario E. Carranza observed that the United States would want to restore its hegemony in the Western hemisphere through a NAFTA-style FTAA in order to “compensate the relative decline of its position in the world economy.” Mario E. Carranza, *MERCOSUR, The Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 *FORDHAM INT’L L.J.* 1029, 1034 (2004). James Petras portrayed such U.S. position as an “imperial project.” *Id.*

¹⁸¹ BHAGWATI, *A STREAM OF WINDOWS*, *supra* note 78, at 309.

¹⁸² *See id.*

¹⁸³ *See generally* Trade Act of 1974 §§ 301–310 (codified as amended at 19 U.S.C. §§ 2411–31 (2000)).

¹⁸⁴ *See generally* JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 189–96 (1997).

¹⁸⁵ *Id.*; *see also* RICHARD PEET, *THEORIES OF DEVELOPMENT* 107–11 (1999).

¹⁸⁶ *See FTAs Lambasted at World Social Forum*, *BRIDGES WKLY. TRADE NEWS DIG.*, Feb. 2, 2005, at 5.

ATN used the World Social Forum to advance the "Stop EPA Campaign," which it operates along with other non-governmental organizations ("NGOs") including Oxfam International, Action Aid, and the Third World Network.¹⁸⁷

Recent debates over public health crises vis-à-vis protection of intellectual property rights of pharmaceutical products have further illustrated the social welfare cost to poor countries inflicted by RTAs mushrooming under Neo-Regionalism. This hegemonic strategy has generated enormous profits for the pharmaceutical industry, in part by forcing the poor to pay high prices for drugs.¹⁸⁸ This deplorable phenomenon stems from the RTAs' departure from the multilateral norms. Although the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") does protect basic intellectual property rights over various drugs, the TRIPS nonetheless provides certain exceptions for "compulsory licensing,"¹⁸⁹ allowing WTO members to produce generic versions of patented drugs without consent of the patent holders should members face national health emergencies.¹⁹⁰ Nonetheless, compulsory licensing is an empty gesture to the world's poorest countries because they have no capability to produce those generics.¹⁹¹ Therefore, a new rule had to be created so that the least developed countries are allowed to import generics from other countries.¹⁹²

Despite this need, certain countries have attempted to water down these pro-development commitments through backdoor deals under RTAs.¹⁹³ For instance, in a recent spate of bilateral RTAs the United States has effectively handed down a five-year shield from generic competition to big pharmaceutical companies by prohibiting generic producers from using pre-existing safety testing data and instead requiring them to conduct very costly tests themselves before getting approval.¹⁹⁴ In addition, the U.S.-

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., Larry Elliott & Charlotte Denny, *U.S. Wrecks Cheap Drugs Deal*, THE GUARDIAN, Dec. 21, 2002, available at <http://www.guardian.co.uk/aids/story/0,,864087,00.html>.

¹⁸⁹ See World Trade Organization, *Frequently Asked Questions about TRIPS in the WTO: Does the Agreement Allow Compulsory Licensing of Patents?*, http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (last visited Sept. 13, 2006).

¹⁹⁰ The Doha Ministerial Meeting reiterated this exception. See Declaration on TRIPS, *supra* note 158.

¹⁹¹ See *Implementation 6*, *supra* note 158.

¹⁹² *Id.*

¹⁹³ See, e.g., Carsten Fink & Patrick Reichenmiller, *Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements*, WORLD BANK TRADE NOTE, Feb. 7, 2005, at 1-4 (documenting the TRIPS-plus protection of intellectual property rights under the recent U.S. FTA deals).

¹⁹⁴ See COSBEY ET AL., *supra* note 77, at 6; see, e.g., Free Trade Agreement, U.S.-Sing.,

Morocco FTA incorporates a controversial “ever-greening” clause that extends the patent life of existing drugs if there is a “new use” for those drugs.¹⁹⁵ This overprotection of the pharmaceutical industry beyond TRIPS discourages the production of generic drugs and eventually limits the poor from accessing these drugs.

In an open letter to USTR, Robert Zoellick, on October 15, 2003 from Doctors without Borders, raised similar concerns over intellectual property provisions under the CAFTA draft. He argued that these TRIPS-plus provisions might inflict “needless suffering and death” on patients with HIV/AIDS and other diseases in the region.¹⁹⁶ In the same line, Paul Hunt, the U.N. Human Rights Rapporteur, has warned that the U.S. bilateral trade talks with Andean countries might conflict with the United States’ international obligations by keeping drug prices unaffordably high for poor people.¹⁹⁷ The United Nations even implied that the lack of affordability created under bilateral RTAs might constitute human rights violations.¹⁹⁸ The criticism against these RTAs was intensified when Thailand hosted the International AIDS Conference in July 2004. At the conference, reports circulated that the recent U.S.-Thailand bilateral trade negotiations threatened to disband the Thai AIDS program in favor of a TRIPS-plus intellectual property rights regime.¹⁹⁹ French President Jacques Chirac even labeled such bilateral pressure as “blackmail.”²⁰⁰

However, the United States is not alone in its proclivity for pursuing

art. 16.8, ¶ 1, May 6, 2003, available at http://www.sice.oas.org/Trade/USA-Singapore/USASingind_e.asp (last visited Sept. 13, 2006) (“If a Party requires the submission of information concerning the safety and efficacy of a pharmaceutical or agricultural chemical product prior to permitting the marketing of such product, the Party shall not permit third parties not having the consent of the party providing the information to market the same or a similar product on the basis of the approval granted to the party submitting such information for a period of at least five years from the date of approval for a pharmaceutical product and ten years from the date of approval for an agricultural chemical product.”).

¹⁹⁵ See COSBEY ET AL., *supra* note 77, at 6–7; Free Trade Agreement, U.S.-Morocco, art. 15.9, ¶ 2, Jun. 15, 2004, available at http://www.sice.oas.org/Trade/US-MoroccoFinalFTA_e/USMorindfinal_e.asp (“In addition, the Parties confirm that patents shall be available for any new uses or methods of using a known product, including new uses of a known product for the treatment of humans and animals.”).

¹⁹⁶ Open Letter from Nicolas de Torrente, Executive Dir. of Doctors Without Borders United States, & Luis Villa, Head of Mission for Doctors Without Borders Guatemala, to U.S. Trade Representative Robert Zoellick (Oct. 15, 2003), available at http://www.doctorswithoutborders.org/publications/openletters/tozoellick_10-15-2003.htm.

¹⁹⁷ See *Concerns Raised over Access to Medicines Under Trade Treaties*, BRIDGES WKLY. TRADE NEWS DIG., July 14, 2004, at 4.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *France Raps ‘US Aids Blackmail,’* BBC NEWS, Jul. 13, 2004, <http://news.bbc.co.uk/2/hi/health/3891385.stm> (last visited Sept. 13, 2006).

TRIPS-plus RTAs with developing countries. In the recent FTA negotiation with the SACU, the European Free Trade Association (“EFTA”) pressured SACU to accept certain TRIPS-plus provisions on public health.²⁰¹ The proposal included measures, such as a “five- to ten-year data protection period for clinical test data” and “five-year patent extensions to brand-name drugs.”²⁰² SACU rejected these measures, just as it rejected similar measures from the United States in a separate FTA negotiation, on the ground that it would jeopardize poor African countries’ access to essential medicines.²⁰³

In sum, considering that most recent RTAs follow the foregoing hub-and-spoke model,²⁰⁴ development failure under Neo-Regionalism is more alarming than previously perceived.

IV. RESTORING THE EQUILIBRIUM: DEFRAGMENTING WORLD TRADE

A. Defragmentation as Multilateralization

To restore the original equilibrium between globalism and regionalism, the currently fragmented global trading system should be defragmented. Yet, defragmentation does not mean undoing those RTAs formed under Neo-Regionalism. Such an option would be neither feasible nor desirable considering the vast political attraction to RTAs as well as their potential contributions to the multilateral trading system. Therefore, defragmentation should aim to bring back the original theme of regionalism under GATT, i.e., complementarity. In other words, defragmentation should project multilateral disciplines to unchecked RTAs so that they can facilitate, not substitute, the multilateral trade and trade-related activities. This strategy, which may be labeled as “multilateralization,” seeks to mend three teleological failures caused by fragmentation—trade, regulatory, and development failure—by restraining divergent and discriminatory aspects of RTAs.

The multilateralization strategy includes an institutional approach,

²⁰¹ See *Southern African Countries Reject ‘TRIPS-Plus’ Demands in FTA Negotiation*, BRIDGES WKLY. TRADE NEWS DIG., Mar. 9, 2005, at 4.

²⁰² *Id.*

²⁰³ *Id.* at 5.

²⁰⁴ See WTO, Under Transformation, *supra* note 71, at 5. After the fall of the fifth WTO Ministerial Conference in Cancún on September 2003, the United States unreservedly revealed its intention for hub-and-spoke bilateral deals by announcing that if “won’t do” countries obstruct multilateral talks, it would proceed with “can do” countries. Robert B. Zoellick, Op.-Ed., *America Will Not Wait for the Won’t-Do Countries*, FIN. TIMES, Sept. 22, 2003, at 23; see also *Agriculture: G-20 Group Discusses Way Ahead; Colombia, Peru Leave Alliance*, BRIDGES WKLY. TRADE NEWS DIG., Oct. 8, 2003, at 1–2.

which involves various arrangements under the WTO, as well as a judicial approach which utilizes the WTO's jurisprudential power.

B. Institutional Defragmentation

1. Open Regionalism

One multilateralization strategy is to sensitize RTAs to the multilateral trading system by breaking their insulating structure. This "opening" of regionalism begins with the softening of the RTAs' exclusive institutional nature so that RTAs' activities are better connected to the multilateral domain.²⁰⁵ The Asia Pacific Economic Cooperation ("APEC") is a case in point.²⁰⁶

APEC's most distinguishing feature is its soft institutionalism.²⁰⁷ APEC did not result from a formal treaty, nor does it have a formal charter or constitution.²⁰⁸ It has no formal decision-making apparatus or dispute-settlement mechanism.²⁰⁹ Commitments made in APEC are not technically binding and thus cannot be enforced.²¹⁰ This informalism²¹¹ helps ease political standoffs that would have resulted from formal structures. For instance, China, Hong Kong, and Taiwan have all been able to attend APEC meetings as independent members.²¹² In a similar context, APEC provided the United States and China with a "non-confrontational" forum for various policy discussions in the "post-Tiananmen" period.²¹³

Yet, APEC's institutional flexibility has contributed most to its complementarity to the multilateral trading system. In stark contrast to inward-looking, preferential regional blocs, APEC's inclusive nature creates multilateral space in which benefits from APEC members' trade and

²⁰⁵ See Sang-Seung Yi, *Endogenous Formation of Customs Unions Under Imperfect Competition: Open Regionalism Is Good*, 41 J. INT'L ECON. 153, 170-71 (1996).

²⁰⁶ See, e.g., Ali Alatas, Former Minister for Foreign Affairs, Indonesia, "ASEAN Plus Three" Equals Peace and Prosperity, Address at the 2001 Regional Outlook Forum of the Institute of Southeast Asian Studies 3 (Jan. 5, 2001), available at <http://www.iseas.edu.sg/trends221.pdf> (contending that "open regionalism" should be the "operating principle" of the ASEAN plus Three, and that it should "complement," not supplant, APEC); cf. SCOLLAY & GILBERT, *supra* note 24, at 147-49 (discussing the "[e]nduring [e]conomic [l]ogic of APEC").

²⁰⁷ See generally Cho, *Rethinking APEC*, *supra* note 93, at 405-06.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See Lorraine C. Cardenas & Arpaporn Buranakanits, *The Role of APEC in the Achievement of Regional Cooperation in Southeast Asia*, 5 ANN. SURV. INT'L & COMP. L. 49 *passim* (1999).

²¹² Cho, *Rethinking APEC*, *supra* note 93, at 406.

²¹³ Janow, *supra* note 67, at 997-98.

investment liberalization might be shared by non-members.²¹⁴ In the APEC, various voluntary, unilateral liberalization schemes can be experimented among member countries (“mini-lateralism”).²¹⁵ For instance, under APEC, Japan and Singapore vowed to liberalize their telecommunications markets; Japan allowed an increase in the number of U.S. auto dealerships in Japan; China allowed foreigners to lease farmland; and Korea opened its construction market to foreigners.²¹⁶ Yet, what has been rehearsed in APEC is eventually liberalized in the multilateral terrain. In this context, a Chinese official once stated that “the WTO is like a lovely banquet, and APEC is the kitchen where the food is prepared.”²¹⁷ It was in the same spirit of complementarity that APEC vigorously advocated the WTO when the success of the UR negotiations and the creation of the WTO were in doubt.²¹⁸

APEC’s open regionalism has recently led to its redoubled efforts to help multilateralize the current RTA trend in East Asia. Based on the firm commitment to an open model, the APEC Business Advisory Council (ABAC) has reaffirmed APEC’s prioritizing of the WTO over the recently proposed Free Trade Area of the Asia Pacific (“FTAAP”), which would have created another inward-looking bloc.²¹⁹ Moreover, in November 2004, APEC Ministers endorsed the “APEC Best Practices for RTAs,” which emphasizes multilateral principles, such as WTO/APEC consistency, transparency, simple rules of origin, open membership, and periodic

²¹⁴ 1994 Sixth Asia-Pacific Economic Cooperation [APEC] Ministerial Meeting, Jakarta, Indonesia, Nov. 11–12, 1994, *Joint Statement*, ¶ 60, available at http://www.apecsec.org.sg/content/apec/ministerial_statements/annual_ministerial/1994_6th_apec_ministerial.html.

²¹⁵ See Shara L. Aranoff, *Regional Trade Organizations: Strengthening or Weakening Global Trade?*, 88 AM. SOC’Y INT’L L. PROC. 309, 312 (1994); Jonathan D. Aronson & Peter F. Cowhey, *Prospects for Post-Uruguay Round Trade Management*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 47 (1994); see generally NORMAN D. PALMER, *THE NEW REGIONALISM IN ASIA AND THE PACIFIC* 175, 177–82 (1991).

²¹⁶ Fischer, *supra* note 56, at 349.

²¹⁷ JONATHAN T. FRIED, *APEC as the Asia-Pacific Model for Regional Economic Cooperation*, in *CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT* 183, 186 (Frederick M. Abbott ed., 1998) (quoting China’s Vice Minister Long Yongtu).

²¹⁸ Cho, *Rethinking APEC*, *supra* note 93, at 413–14 & n.138.

²¹⁹ See Media Release, APEC Bus. Advisory Council, Senior Business Executives Deliver Recommendations to APEC Leaders: Successful Conclusion of WTO Negotiations Top Priority (Nov. 20, 2004), available at http://www.apec.org/apec/news__media/2004__media_releases/201104_bizexecrecmdapecleaders.html; see also Fred Bergsten, Comment, *Plan B for World Trade: Go Regional*, FIN. TIMES, Aug. 16, 2006, at 13 (proposing the FTAAP initiative as a Plan B to the moribund WTO Doha round talks); Sungjoon Cho, Letter to Editor, “Plan B” Is Always Inferior to “Plan A”, FIN. TIMES, Aug. 22, 2006, at 10 (arguing that Bergsten “profoundly underestimates the demerits of regionalism”).

review.²²⁰ To improve transparency, APEC Ministers also approved a new “Reporting Template” that enables member economies to share information on their RTAs.²²¹ The Reporting Template is geared particularly toward open regionalism in that it requires APEC Members to describe how their RTAs complement their trade liberalization efforts under the WTO, and to state when they should notify the WTO of their RTAs.²²²

Perhaps APEC could go even further by establishing a special task force on trade regionalism that would monitor RTAs in the APEC region. The guiding principle of such monitoring would be complementarity to the WTO. Non-binding task force recommendations could help RTA parties adjust their regional trade policies to conform to the multilateral trading principles. The role of the task force mirrors that of GATT Article XXIV—screening RTAs from a multilateral standpoint—yet it goes beyond the Article’s capability in that it also monitors RTAs’ post-formation activities.

In sum, APEC’s experience with open regionalism provides an effective defragmentation model.²²³ The APEC model, characterized by flexibility and openness, can be employed in other RTAs. After a regional rehearsal, trade and investment liberalization may then be multilateralized on an MFN-basis to non-members. This open, non-discriminatory model can avoid the welfare costs caused by a closed, discriminatory structure of RTAs, thereby overcoming their trade failure. In particular, poor non-member countries will enjoy, free from regional exclusivity, more and better access to foreign markets, which in turn offers one of the best routes to development.

2. Regulatory Convergence

Under the institutional equilibrium between the WTO and RTAs, the latter may function as “test laboratories”²²⁴ in which members can

²²⁰ APEC, *Best Practice for RTAs/FTAs in APEC*, Doc. 2004/AMM/003 (Nov. 17–18, 2004), available at http://www.apec.org/apec/apec_groups/other_apec_groups/FTA_RT.html.

²²¹ APEC, *IAP Update Template on RTAs/FTAs*, Doc. 2005/SOM3/040 (Sept. 13–14, 2005), available at http://www.apec.org/apec/documents_reports/senior_officials_meetings/2005.html.

²²² *Id.*

²²³ See GLOBAL ECONOMIC PROSPECTS, *supra* note 10, at xi (viewing that open regionalism would reduce exclusiveness of preferences structured in regional blocs); Germán Creamer, *Open Regionalism in the Andean Community: A Trade Flow Analysis*, 2 WORLD TRADE REV. 101 (2003) (showing that the Andean Free Trade Zone established in 1993 has not reduced extra-region trade while increasing intra-region trade); cf. Sherry M. Stephenson, *Regional Versus Multilateral Liberalization of Services*, 1 WORLD TRADE REV. 187, 208 (2002) (observing that regional services liberalization could be applied ‘*de facto*’ on an MFN basis and then multilateralized under the WTO system).

²²⁴ See John H. Jackson, *Regional Trade Blocs and the GATT*, 16 WORLD ECON. 121, 130

experiment with various regulatory standards while not necessarily undermining global regulatory coherence. However, when this equilibrium is broken, these different regulations tend to create regulatory clashes between one another.²²⁵ Therefore, multilateralization provides an adequate level of regulatory convergence so that regulatory diversity remains at a tolerable level.

Multilateral agreements under the WTO system, such as the Agreement on Technical Barriers to Trade (“TBT”) and the Agreement on Sanitary and Phytosanitary Measures (“SPS”), provide ample opportunities to converge different regional standards in major areas, including human health and safety. Interestingly, however, these agreements have focused more on harmonizing procedure, rather than substance. Most obligations stipulated in TBT and SPS, such as transparency,²²⁶ are designed to achieve a “convergence in procedures” rather than a “convergence in particular regulatory outcomes.”²²⁷

Nonetheless, a procedural convergence may not necessarily be translated into a substantive convergence. While sharing the same procedural disciplines, various standards under RTAs may still diverge in their specific *levels* of regulatory protection. To harmonize these levels may be far more burdensome than procedural harmonization under TBT or SPS. To eliminate substantive regulatory divergence among RTAs may require launching new harmonization treaties, which themselves have major shortcomings, such as a tedious negotiation process²²⁸ and vague outcomes.²²⁹

Yet, soft law, i.e., international standards (guidelines or

(1993); Harold Hongju Koh, *Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT’L L. 193, 248 (1987).

²²⁵ See *supra* Part III.B.2.

²²⁶ See, e.g., *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)*, Annex A1, the WTO Agreement, *supra* note 5, art. 7, Annex B, para. 5 [hereinafter SPS]; *Agreement on Technical Barriers to Trade (TBT)*, Annex 1, the WTO Agreement, *supra* note 5, arts. 2.5, 2.9, 5.2.2, 10 [hereinafter TBT].

²²⁷ David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years*, 32 N.Y.U. J. INT’L L. & POL. 865, 872 (2000).

²²⁸ See, e.g., John H. Jackson, *Appraising the Launch and Functioning of the WTO*, 39 GERMAN Y. B. INT’L L. 20, 39 (1996) (viewing that “[t]he decision-making and voting procedures of the WTO, although much improved over the GATT, still leave much to be desired. It is not clear how the consensus practice will proceed, particularly given the large number of countries now or soon involved.”).

²²⁹ See, e.g., John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT’L ECON. L. 3, 8 (2000) (viewing that “[t]reaties are often an awkward albeit necessary method of designing institutions needed in today’s interdependent world, but they do not solve many problems.”).

recommendations), can overcome these problems to a considerable degree. International standards feature a more flexible rule-making process than hard law (treaties) due to their non-binding nature.²³⁰ International standards also provide more concrete regulatory referential points because epistemic regulators, rather than diplomats, set the standards.²³¹ Both TBT and SPS expressly *require* WTO Members to use international standards as a basis of their regulations.²³² Likewise, both TBT and SPS provide Members a critical incentive to use international standards, by establishing a rebuttable presumption that regulations promulgated in accordance with international standards do not pose an obstacle to international trade in violation of WTO obligations.²³³ Furthermore, to encourage trans-

²³⁰ See Stephen Zamora, *Is There Customary International Economic Law?*, 32 GERMAN Y. B. INT'L L. 9, 34–35 (1989) (discussing the “soft law” nature of customary international economic law); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 537–38 (1991) (documenting benefits of informal agreements over formal treaties).

²³¹ See notably Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 535 (1995); Anne-Marie Slaughter, *Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997); ANNE-MARIE SLAUGHTER, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS & INTERNATIONAL LAW 178 (Michael Byers ed., 2000); see also OECD, *Regulatory Reform and International Standardization*, Working Party of the Trade Committee, TD/TC/WP(98)36/FINAL, 28–32 (1999) (discussing “regulators as players in standardization”).

²³² TBT, *supra* note 226, art. 2.4 (“Where technical regulations are required and relevant international standards exist or their completion is imminent, Members *shall* use them, or the relevant parts of them, as a basis for their technical regulations.”) (emphasis added); *id.* art. 2.6 (“With a view to harmonizing technical regulations on as wide a basis as possible, Members *shall* play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.”) (emphasis added); SPS, *supra* note 226, art. 3.1 (“To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members *shall* base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist.”) (emphasis added); *id.* art. 3.4 (“Members *shall* play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.”) (emphasis added).

²³³ TBT, *supra* note 226, art. 2.5 (“Whenever a technical regulation is . . . in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.”); SPS, *supra* note 226, art. 3.2 (“Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”).

governmental cooperation on harmonization through international standards, both TBT and SPS co-opt certain international regulatory institutions that serve as *shells* for such cooperation, such as the International Organization for Standardization,²³⁴ the International Electrotechnical Commission²³⁵ and the Codex Alimentarius Commission.²³⁶

Considering that most RTA members are WTO Members at the same time, anchoring their regional regulations to these international standards achieves an adequate level of regulatory convergence while still retaining enough regulatory leeway for regional customization. In fact, this multilateralization strategy has already been employed by certain RTAs in such regulatory areas as “trade facilitation,” i.e., simplification and modernization of customs procedures. These RTAs base their customs regulations on various multilateral rules and standards in this field, such as the World Customs Organization (“WCO”), Kyoto Convention and the WCO Arusha Declaration.²³⁷ RTAs based on common multilateral regulatory anchors result in similar regional customs procedure regulations.²³⁸

In a similar context, RTAs can function as regulatory platforms to implement global standards. Recently, the North American Commission for Environmental Cooperation (“CEC”), which is NAFTA’s environmental arm, released a report titled “Implementing the Global Programme of Action in North America.”²³⁹ The report contains recommendations on how to effectively implement international protocols on environmental protection, such as the “United Nations Global Programme of Action for the Protection of the Marine Environment from Land Based Activities,” (“GPA”) in North America. The recommendations came from environmental NGOs that conducted two pilot projects on this matter.²⁴⁰ By implementing global environmental standards like GPA in the regional context, NAFTA can play a critical role in achieving multilateral regulatory goals. APEC can also function as an active implementation platform for multilateral regulatory norm. For instance, APEC’s Sub-Committee on

²³⁴ The International Organization for Standardization (ISO), *What is ISO*, <http://www.iso.org/iso/en/aboutiso/introduction/index.html#two> (last visited Oct. 1, 2006).

²³⁵ The International Electrotechnical Commission (IEC), *Mission & Objectives*, <http://www.iec.ch/about/mission-e.htm> (last visited Oct. 1, 2006).

²³⁶ The Codex Alimentarius Commission, http://www.codexalimentarius.net/web/index_en.jsp (last visited Oct. 1, 2006).

²³⁷ Evdokia Moisé, *Trade Facilitation*, in OECD, *REGIONALISM*, *supra* note 7, at 92.

²³⁸ OECD, *REGIONALISM*, *supra* note 7, at 16.

²³⁹ CEC, *Implementing the Global Programme of Action in North America: Lessons Learned from Two Pilot Projects*, issued on Dec. 20, 2004, available at http://www.cec.org/files/PDF/BIODIVERSITY/NALL-cam_en.pdf.

²⁴⁰ *Id.*

Standards and Conformance expressly pursues the “broader adoption of, and alignment with, international standards by APEC members” in accordance with TBT and SPS.²⁴¹ In this line, the Sub-Committee often participates in the TBT meeting to present its regulatory programs to the multilateral forum.²⁴²

The above-mentioned multilateralization strategies can be labeled as positive harmonization in the sense that diverse regulations under RTAs are adjusted towards common regulatory references such as international standards. Yet, defragmentation can also be attained through a *negative* mode of harmonization, i.e., “mutual recognition.” If each member of an RTA recognizes other members’ different regulations as functionally equivalent to its own regulations, such regulatory difference is no longer a regulatory divergence which fragments their internal trade, but rather an acceptable regulatory diversity which can coexist with free trade. If the RTA also permits non-members to join such mutual recognition arrangements and thus a recognition circle is widened, it even further contributes to defragmentation of global trade. This “open recognition” may be required under GATT Articles I and XXIV²⁴³ as it is under Article VII of General Agreement on Trade in Services (“GATS”).²⁴⁴

In sum, potential and actual regulatory fragmentation which proliferating RTAs inflict on the global trading community can be mitigated, if not fully eradicated, through various multilateralization strategies such as harmonization and open recognition. Therefore, this regulatory convergence can restore the equilibrium disrupted by fragmentation introduced by RTAs.

3. Monitoring and Surveillance of Multilateralization

The foregoing multilateralization strategy, i.e., open regionalism and regulatory convergence, necessitates a certain mechanism within the WTO, which effectively supervises and monitors RTA activities on a regular basis. However, the WTO has not inherited any positive institutional tradition

²⁴¹ APEC Sub-Committee on Standards and Conformance, 2003 Collective Action Plan, available at http://www.apecsec.org.sg/apec/apec_groups/committees/committee_on_trade/sub-committee_on_standards.downloadlinks.0005.LinkURL.Download.ver5.1.9 (last visited Mar. 8, 2005).

²⁴² *Id.*

²⁴³ See Trachtman, *supra* note 65, at 491.

²⁴⁴ General Agreement on Trade in Services, art. XXIV, Annex 1 B, WTO Agreement, *supra* note 5; OECD, REGIONALISM, *supra* note 7, at 19; Kalypso Nicolaïdis & Joel P. Trachtman, *From Policed Regulation to Managed Recognition in GATS*, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 241, 276–77 (Pierre Sauve & Robert M. Stern eds. 2000) (suggesting a requirement of “transitivity” under which hubs of mutual recognition arrangements (MRAs) are required to merge different MRAs).

from GATT in this matter. Although “working parties” were established under the GATT system to examine the compatibility of RTAs with GATT Article XXIV, their formation and operation was only on an *ad hoc* basis, and served very little function beyond a mere talk shop. In nearly all cases, those working parties failed to render clear conclusions on the legality of RTAs under GATT and hence no legal disciplines.²⁴⁵ Unfortunately, the current Committee of Regional Trade Agreements (“CRTA”) mirrors the poor performance of GATT working parties. Created under the WTO as a permanent institution with the same mandate as GATT working parties on RTAs, CRTA’s operation has mostly been ineffective. A WTO Panel observed that “[t]he Committee . . . has been unable to finalize reports on any of these examinations. Progress in this regard was slowed, *inter alia*, by disagreement among Members on the interpretation of certain elements of those rules relating to RTAs, as well as on procedural aspects.”²⁴⁶

Facing an impasse under CRTA, the WTO needs a well-functioning RTA monitoring and surveillance mechanism. The recent World Bank report has also emphasized that more monitoring and exposure of problematic RTAs would give excluded members the opportunity to challenge them “in the court of public opinion.”²⁴⁷ In this regard, the Trade Policy Review Mechanism (“TPRM”) seems to provide a powerful model.²⁴⁸ Using peer pressure, TPRM functions as a surveillance mechanism under which WTO Members discuss the WTO compatibility of a wide spectrum of Members’ trade policies. TPRM also serves as a dispute prevention mechanism by allowing members to discuss controversial policies before they escalate into full blown disputes. Therefore, WTO Members can monitor and supervise RTA activities under TPRM in a discursive, rather than confrontational, format.

Admittedly, CRTA is not without any merits despite its prior unsatisfactory operation. CRTA is still a significant depository of knowledge and information on RTAs. To make the most of its resource while achieving meaningful multilateral surveillance over RTA activities, a CRTA-TPRM joint forum on RTAs may be conceived under the WTO. This institutional innovation can enable WTO Members to effectively manage and guide RTA behavior under the multilateral principles without losing sight of potential merits of RTAs.

²⁴⁵ Cho, *A New Perspective*, *supra* note 11, at 435–43.

²⁴⁶ Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, para. 2.7 (adopted Nov. 19, 1999).

²⁴⁷ GLOBAL ECONOMIC PROSPECTS, *supra* note 10, at xiv.

²⁴⁸ See CB Report, *supra* note 6, at 27.

C. Judicial Defragmentation

1. WTO Tribunal

Institutional defragmentation strategies demand political support for their successful implementation because these strategies prescribe that WTO Members create and operationalize a certain institutional apparatus. Often, such institutionalization is accomplished by legislative action in the WTO. Therefore, WTO Members must accumulate and spend political capital in order to initiate or complete defragmentation projects. This may limit the overall feasibility of an institutional approach, casting clouds over the Doha Round agenda of “clarifying and improving” disciplines over RTAs.²⁴⁹ Should the WTO tribunal (panels and the Appellate Body) play an active role in defragmenting world trade, especially when Members fail to act for political reasons?

As discussed above,²⁵⁰ inherent ambiguities of GATT Article XXIV not only failed to render any legal discipline on the formation of RTAs but also were exploited by regional members to form blocs which would not have survived otherwise rigorous analyses under the Article. A GATT panel refused to remedy these legal ambiguities through clear interpretation of Article XXIV, relinquishing its jurisdiction over this issue on the basis of what might be called the GATT version of the “political question” doctrine.²⁵¹ In the panel’s view, examination of RTAs was reserved for contracting parties (GATT Members), not for itself.²⁵² GATT Members also failed to reach firm decisions on the legality of RTAs in nearly all cases.²⁵³ More often than not, political stakes were too high to condemn a certain RTA from an apolitical, i.e., legal, standpoint.

However, the new WTO system responded to this legal vacuum by explicitly recognizing the role of the dispute settlement mechanism in investigating GATT Article XXIV issues. Paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 (Article XXIV Understanding) provides that any issues relating to GATT Article XXIV, including the GATT-compatibility of an RTA, are

²⁴⁹ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

²⁵⁰ See *supra* Part III.B.1.

²⁵¹ See Cho, *A New Perspective*, *supra* note 11, at 438.

²⁵² *European Community-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, L/5776, paras. 4.15–16 (unadopted, dated Feb. 7, 1985) (ruling that “examination—or re-examination—of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES” and that “it should, in the absence of a specific mandate by the Council to the contrary, follow this practice also in the case before it and therefore abstain from an overall examination of the bilateral agreements”).

²⁵³ See Cho, *A New Perspective*, *supra* note 11, at 436–37.

reviewable under the WTO dispute settlement system.²⁵⁴ This is a critical delegation by WTO Members to the (quasi-) judicial organ, i.e., the WTO tribunal, in examining Article XXIV matters. Delegated to adjudicate “any matters arising from the application” of Article XXIV, the WTO tribunal now shares the RTA jurisdiction with the CRTA, at least concurrently, if not exclusively. This comprehensive delegation reflects a collective realization by WTO Members themselves regarding their political inertia over RTA issues. In other words, they tied their political hands to the mast of legalism by conferring the WTO tribunal an “enhanced role for a self-confident judiciary.”²⁵⁵

This delegated power under the Article XXIV Understanding was exercised for the first time in 1999. In *Turkish Quantitative Restrictions* (“*Turkish QRs*”), India complained of Turkey’s imposition of new quotas on India’s textile exports to Turkey.²⁵⁶ In defense, Turkey claimed that Article XXIV justified its new quotas because those quotas were necessary to establish a customs union with the European Union.²⁵⁷ According to Turkey, it was *forced* to follow the E.U.’s quota system on India’s textile exports in order to bring its customs policies into conformity with those of the European Union in pursuit of Article XXIV, Paragraph 8. However, the Appellate Body (“AB”) ruled that Turkey’s new quota system was not necessary, and thus not justified under Article XXIV, because Turkey could have pursued other reasonable alternatives, such as a system of certificates of origin, which would allow the European Union to identify Indian exports that move through Turkey.²⁵⁸ This system would allow Turkey to enjoy free access to the European Union as a customs union member without unduly restricting Indian exports to Turkey.

The *Turkish QRs* case is of great consequence in terms of defragmentation. Critically, the AB anchored its analysis firmly to the objective and purpose (*telos*) of RTAs in the WTO system which is stipulated in Paragraphs 4 and 5 of Article XXIV. The *telos* permits the

²⁵⁴ “The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.” *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, WTO Agreement, *supra* note 5, Annex 1 A, para. 12 (emphasis added).

²⁵⁵ See Philippe Sands, ‘Unilateralism’, *Values, and International Law*, 11 EUR. J. INT’L L. 291, 301 (2000) (advocating the Appellate Body’s “enhanced role for a self-confident judiciary, filling in the gaps which states in their legislative capacity have been unwilling—or unable—to fill”).

²⁵⁶ *Appellate Body Report, Turkish QRs*, *supra* note 124.

²⁵⁷ *Id.* para. 17.

²⁵⁸ *Id.* para. 62.

formation of an RTA only to the extent that it facilitates, not restricts, global trade.²⁵⁹ This “complementarity” of regionalism to multilateralism checks fragmentation of global trade by disallowing the introduction of new trade restrictions vis-à-vis non-member countries under the excuse of self-contained regionalism. This teleological interpretation by the AB pioneered a new way in reviewing trade diversion from a judicial standpoint regardless of a general compatibility of a specific RTA with Article XXIV. It should be noted that the AB in the *Turkish QRs* did not address the compatibility issue itself, which it viewed as an “economic” test.²⁶⁰ The AB may not be in a good position to conduct such a test. Furthermore, even if it could conduct the test it would be nearly impossible for the AB to recommend that an RTA should be disassembled when the RTA failed the test. Therefore, the AB can play a better role in defragmenting global trade by striking down specific trade diversions, such as new import quotas in this case, than by undertaking a Herculean task of examining a general compatibility of RTAs with WTO norms.

In sum, the *telos* of regionalism within the WTO system, i.e., complementarity, is an ultimate criterion of judicial review on RTA matters. This complementarity provides to RTAs not only the multilateral discipline but also the “flexibility”²⁶¹ under which they can be formed and operate. Thus, complementarity is an indispensable fulcrum with which the AB can mete out equilibrium between regionalism and multilateralism over specific RTA measures. In this very context, the AB in *Turkish QRs* criticized the panel for its failure to pay due attention to the *telos* in its ruling,²⁶² although the AB reached the same conclusion as the panel.

2. Regional Trade Tribunal

Regional trade tribunals can also help avoid fragmentation of global trade by interpreting RTA provisions coherently with the WTO rules. By doing so, regional trade tribunals operate in the same normative force field as the WTO tribunal because both tribunals use the common grammar and syntax of free trade. NAFTA panels demonstrated this propitious possibility a decade ago. In the *Tariffication* case,²⁶³ the United States accused Canada of violating NAFTA rules when Canada increased its tariffs on agricultural products. Canada justified this unusual tariff increase under the “tariffication” mechanism of the WTO Agreement on Agriculture,

²⁵⁹ *Id.* paras. 56–57.

²⁶⁰ *Id.* para. 55.

²⁶¹ *Id.* para. 48.

²⁶² *Appellate Body Report, Turkish QRs*, *supra* note 124, paras. 43, 64.

²⁶³ *NAFTA—Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01 (Dec. 2, 1996), available at <http://www.sice.oas.org/DISPUTE/nafta/english/ca95081a.asp>.

which encourages Members to convert quantitative restrictions, i.e., quotas, into less trade distorting trade barriers, i.e., tariffs.²⁶⁴ Based on a teleological and holistic hermeneutics, a NAFTA panel under Chapter 20 unanimously upheld Canada's otherwise technical violation of NAFTA rules by emphasizing that NAFTA's objective of trade liberalization should accommodate, not defy, the WTO's tariffification regime.²⁶⁵

More recently, in the 2005 *Softwood Lumber* case,²⁶⁶ a NAFTA binational panel under Chapter 19 struck down the long-held "zeroing" practice applied by the U.S. Commerce Department in antidumping investigations, on the ground that the practice was inconsistent with WTO norms. Zeroing refers to a specific methodology in calculating a general dumping margin for a product in question under which negative individual dumping margins are treated as zero before aggregating all individual dumping margins.²⁶⁷ Although a U.S. court has upheld this practice,²⁶⁸ it has been severely criticized by foreign trading partners because it inflates dumping margins and thus makes it easier to find dumping.²⁶⁹ The WTO AB has already condemned this practice.²⁷⁰ Invoking the celebrated *Charming Betsy* doctrine,²⁷¹ the NAFTA panel held that the zeroing practice ran afoul of the U.S. international obligations under the WTO.²⁷²

These two NAFTA decisions eloquently demonstrate a harmonious hermeneutics exercised by regional trade tribunals to prevent narrow regional agendas from frustrating the multilateral trading system. Accordingly, regional trade tribunals can contribute to defragmentation of world trade by interpreting RTA provisions in a way that is consistent with the WTO rules. To further develop such constructive interpretations, regional trade tribunals might be permitted to request non-binding "advisory opinions" from the WTO Appellate Body on issues interlacing

²⁶⁴ *Id.* paras. 59–60.

²⁶⁵ *Id.* paras. 167, 191–201.

²⁶⁶ NAFTA—*Softwood Lumber Products from Canada*, USA-CDA-2002-1904-2 (June 9, 2005) [hereinafter *NAFTA Lumber*].

²⁶⁷ See *United States—Laws, Regulations and Methodology for Calculating Dumping Margins* ("Zeroing"), WT/DS294/R, para. 2.3 (Oct. 31, 2005).

²⁶⁸ See *Corus Staal BV v. Dept. of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334, 1343–44 (Fed. Cir. 2004).

²⁶⁹ See BRINK LINDSEY & DANIEL J. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* 70–72 (2003).

²⁷⁰ See Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, paras. 54–55 (Mar. 1, 2001); Appellate Body Report, *U.S.—Final Dumping Determination on Soft Lumber from Canada*, WT/DS264/AB/R, para. 183 (a) (Aug. 11, 2004).

²⁷¹ *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804). Chief Justice Marshall ruled that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Id.*

²⁷² *NAFTA Lumber*, *supra* note 266, at 43–44.

multilateralism and regionalism.

V. CONCLUSION

The global trading system has been severely fragmented by a surge of formation of regional trading blocs. Such fragmentation short-circuits the MFN-based multilateral trading system, as it did in the interwar era. In its place, it instills an ethos of hostility²⁷³ which eventually threatens world peace.²⁷⁴ If the current trend of regionalism grows unchecked, the global trading community could degenerate into economic balkanization, as such balkanization in the Thirties begot WWII. Multilateralism must be reinstated, not only for the sake of international trade, but also for the more profound purpose of global stability. Defragmenting the system requires both institutional and judicial strategies. Regionalism will retain a place in the global trading system, but it must not compromise the *telos* of the multilateral trading system, which encompasses trade liberalization, global regulation, and development. Therefore, any new configuration of regional trading blocs in the global system should be a *federalistic* one that guarantees a subtle constitutional balance between multilateral disciplines and regional flexibility.

As the former WTO Director-General Renato Ruggiero emphasized, regionalism and multilateralism can converge on the basis of "shared aims and principles," which leads eventually to "one free global market."²⁷⁵ Defragmenting world trade is the key to this convergence.

²⁷³ CB Report, *supra* note 6, at 27 (quoting John Maynard Keynes).

²⁷⁴ See Sylvia Ostry, *The World Trading System: In Dire Need of Reform*, 17 TEMP. INT'L & COMP. L. J. 109, 124 (2003).

²⁷⁵ Renate Reggiero, *The Road Ahead: International Trade Policy in the Era of the WTO*, Address to the Fourth Annual Sylvia Ostry Lecture (May 28 1996), in WTO Press/49; see also FRANKEL, *supra* note 27, at 207.